No. [redacted]253

TRANSCRIPT OF RECORD.

JUL 11 1956
JOHN T. FEY, Clerk

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT.

No. 16,135

RONALD MILLER, ET AL.,

Appellants,

versus

ROBERT W. JENNINGS, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(ORIGINAL RECORD RECEIVED MAY 31/56.)

U. S. COURT OF APPEALS
FILED

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CAPTION.

BE IT REMEMBERED, that at a regular term of the United States District Court in and for the Western District of Texas, the Honorable R. E. Thomsson, presiding, and holding its sessions at El Paso, Texas, which term began on the 3rd day of October, A. D. 1955, and continued in session from term to term to, and including, the 27th day of January, 1956, there came on to be heard and determined, among other causes pending on the docket, the following cause; to wit:

No. 1683 Civil Action.

RONALD MILLER, ET AL,

Plaintiffs,

versus

ROBERT W. JENNINGS, ET AL,

Defendants.

A transcript of the proceedings follows:

PETITION FOR REMOVAL.

(Filed November 25, 1955.)

In the United States District Court for the Western District of Texas, El Paso Division.

Ronald Miller, et al., Plaintiffs,

v. No. 1683 Civil.

Robert W. Jennings, et al., Defendants.

To the Honorable Judge of the District Court of the United States for the Western District of Texas, El Paso Division:

Come now the United States of America, Robert W. Jennings, Regional Director of the Bureau of Recla-

mation, and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation, acting by and through J. Lee Rankin, Assistant Attorney General, Russell B. Wine, United States Attorney, and William H. Veeder, Attorney, Department of Justice, by the direction of the Attorney General of the United States of America, and respectfully allege:

I.

There was filed on the 1st day of November, 1955, the complaint in the above-entitled action in the District Court of Hudspeth County, Texas, 34th Judicial District. Named as defendants, among others, are the United States of America, Robert W. Jennings, Regional Director of the Bureau of Reclamation, and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation.

II.

By their complaint the plaintiffs seek a declaratory judgment against the defendants in connection with plaintiffs' claimed rights to the use of water in the Rio Grande. That complaint discloses the action is founded on claims or rights arising under the Constitution, treaties or laws of the United States. Plaintiffs, moreover, request the Court to enter a permanent injunction enjoining and restraining the defendants Robert W. Jennings, Regional Director of the Bureau of Reclamation, and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation. Involved are alleged rights to the use of water claimed by the plaintiffs in alleged flood, storm and return flow waters from the Rio Grande Project.

There is attached a copy of the complaint filed by plaintiffs in the cause in question.

III.

Defendant Robert W. Jennings, Regional Director of the Bureau of Reclamation, is a subordinate of the Department of the Interior, whose authority is derived entirely from, and whose official actions described in the complaint are subject to the complete control of the Secretary of the Interior, defendant Jennings having no authority other than that derived from the Secretary of the Interior.

Similarly Defendant H. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation, is a subordinate of the Department of the Interior, whose authority is derived entirely from, and whose official actions described in the complaint are subject to the complete control of the Secretary of the Interior, defendant Resch having no authority other than that derived from the Secretary of the Interior.

Moreover, the powers of the Secretary of the Interior as an official in the executive Branch of the Government of the United States of America are derived in their entirety from the Constitution, treaties, and laws enacted by the Congress.

IV.

The defendant United States of America derives all of its powers in connection with the administration of the Rio Grande Project here involved from the Constitution.

V.

Service of a copy of the summons and complaint in the subject cause was made upon the United States of America pursuant to 43 U. S. C. 666 by the delivery of it to John V. Lindsay, Executive Assistant to the Attorney General of the United States, who is empowered to receive service on behalf of the Attorney General pursuant to 43 U. S. C. 666.

VI.

This petition is accompanied by a bond with good and sufficient surety conditioned upon the payment by Defendant Robert W. Jennings, Regional Director of the Bureau of Reclamation, and defendant W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation, of costs and disbursements by reason of this proceeding in the event that it is determined that the cause was not removable or was improperly removed.

VII.

Copies of the process, pleadings and orders served upon petitioners are hereto attached.

VIII.

This petition for removal is pursuant to the provisions of 28 U. S. C. 1441, 28 U. S. C. 1442 and 28 U. S. C. 1446.

Wherefore the Defendants United States of America, Robert W Jennings, Regional Director of the Bureau

of Reclamation, and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation, pray that the aforesaid and above-entitled action No. 1188 in the District Court of Hudspeth County, Texas, 34th Judicial District be removed to the District Court of the United States for the Western District of Texas, El Paso Division for trial and determination or for such other proceedings as may be necessary so that the ends of justice will be served and that this Court proceed thereupon as if the cause had been originally commenced herein.

(S) J. LEE RANKIN,
(J. Lee Rankin),
Assistant Attorney General.

(S.) RUSSELL B. WINE,
(Russell B. Wine),
United States Attorney.

(S.) HOLVEY WILLIAMS,
Asst. U. S. Attorney.

(S.) WILLIAM H. VEEDER,
(William H. Veeder),
Attorney, Department of Justice.

Dated: November 23, 1955.

District of Columbia, ss.

J. Lee Rankin, Assistant Attorney General, and William H. Veeder, Attorney, Department of Justice, being first duly sworn, depose and say:

That they are attorneys for the United States of America, Defendant, and the Defendants Robert W. Jennings, Regional Director of the Bureau of Reclamation, and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation, in the above-entitled cause;

That they have read the foregoing petition for removal and are acquainted with the content thereof and know that the statements therein contained are true and correct.

(S.) J. LEE RANKIN,
(J. Lee Rankin),
Assistant Attorney General.

(S.) WILLIAM H. VEEDER,
(William H. Veeder),
Attorney, Department of Justice.

Subscribed and sworn to before me this 23rd day of November, 1955.

(S.) EMILY McC. IRELAND,
(Seal) Notary Public, D. C.

My Commission Expires: Feb. 28, 1959.

PLAINTIFFS' ORIGINAL PETITION.

Office of the—Received Nov. 14, 1955—Attorney General.

No. 1188.

E 4501.

Serv Herbert Brownell. Attorney General.
Rec'd
Service 11/14/55.

(S.) JOHN V. (Illegible),
For Herbert Brownell, Jr.

In the District Court of Hudspeth County, Texas, 34th Judicial District.

Ronald Miller, et al., Plaintiffs,
vs.
Robert W. Jennings, et al., Defendants.

To the Honorable Judge of Said Court:

Come now, Ronald Miller and the other plaintiffs herein named, complaining of Robert W. Jennings and the other defendants herein named, and for cause of action would show the Court the following:

I. Parties.

1.1 Plaintiff Hudspeth County Conservation & Reclamation District No. 1 (herein called "Hudspeth District") is a municipal corporation organized under the laws of Texas for the purpose of constructing, owning, maintaining and operating irrigation and drainage works for the benefit of lands within the district limits (herein called "Hudspeth lands").

1.2 Plaintiffs Ronald Miller, W. F. Hargrove, Jr., J. B. Williams, Kenneth Jones and Lenox W. Moore are individual citizens of the State of Texas and residents of Hudspeth County. The said individual Plaintiffs are owners of and water users on Hudspeth lands and bring this action on behalf of themselves and all other Hudspeth landowners and water users similarly situated. The said Hudspeth landowners and water users number approximately 90, and it is therefore impractical to bring them all before the Court.

1.3 Defendant Robert W. Jennings is a resident of Potter County, and defendant W. F. Resch is a resident of El Paso County. They are respectively, Regional Director of the Bureau of Reclamation and Project Manager of the Rio Grande Project. Defendant Jennings had general supervision over all operations of the Bureau in Texas and New Mexico, including the Rio Grande Project. Defendant Resch has direct supervision over the operations of the Project under the general supervision of Defendant Jennings.

1.4 Defendants T. D. Lovelady and Louise Young Lovelady, are residents of Hudspeth County; defendants Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., and S. Y. Wilson are residents of El Paso County. They are owners of and water users on lands lying below Elephant Butte Dam and above the El Paso County-Hudspeth County Line which are irrigated or irrigable from the Rio Grande River. Said Defendants are sued individually and as representatives of all landowners or water users claiming adversely to Plaintiffs in rights to the use for irrigation of the waters of the Rio Grande (or the return flow therefrom) between Elephant Butte Dam and the El Paso-Hudspeth County line. The said adverse claimants number more than one thousand, many of whom reside outside the State of Texas, and it is therefore impractical to bring them all before the Court.

1.5 Defendant El Paso County Water Improvement District No. 1 (herein called "El Paso District") is a municipal corporation organized under the laws of Texas and for the purpose of contracting with the United States with respect to the water supply of

lands within its district limits (herein called "El Paso lands") and, pursuant to such contracts, collecting money from its water users and paying them over to the United States. Defendant N. B. Phillips, a resident of El Paso County, is Manager of El Paso District

"1.6 Defendant the United States of America (herein called "the Government") is a public corporation. This is a suit (a) for the adjudication of rights to the use of water of a river system or other source, or (b) for the administration of such rights. The United States is the owner of certain rights to the use of water on about 400 acres of land comprising the Federal Detention Farm at La Tuna, Texas. The Government claims to be the owner of a right to the use of water to propel Government-owned power facilities at Elephant Butte Dam. The United States is a necessary party to this suit. By Section 208 of the Act of July 10, 1952, 62 Stat. 560, 43 U.S.C.A. sec. 666 the United States consented to be joined as a party defendant in suits such as this.

II. Introductory.

2.1 Elephant Butte Dam, located on the Rio Grande River in New Mexico about 125 miles above the City of El Paso, is owned by the United States and operated by the Bureau of Reclamation as a part of the Rio Grande Project. Elephant Butte Dam impounds and stores the waters of the Rio Grande in Elephant Butte Reservoir, which is one of the great water storage reservoirs of the country.

2.2 Fort Quitman, Texas, is the site of an abandoned stage coach post on the river about 85 miles

below the City of El Paso, a few miles below the foot of Hudspeth District, at the foot of the El Paso Valley, and near the head of Box Canyon. Over the course of many years, treaties, conventions, compacts, statutes and regulations have established Fort Quitman as a juristic division point between the Upper Rio Grande River and the Lower Rio Grande River.

2.3 The area between Elephant Butte Dam and Fort Quitman lies in one of the most arid regions in the United States, having an average annual rainfall of less than nine inches. Agriculture in the area is entirely dependent upon irrigation. Most of the lands hitherto irrigated from the Rio Grande in the Elephant Butte-Fort Quitman area lie within the municipal limits of three contiguous irrigation districts: (a) Elephant Butte Irrigation District of New Mexico (herein called "Elephant Butte District"), the municipal limits of which embrace substantially all the irrigated lands in New Mexico; (b) El Paso District, the municipal limits of which embrace substantially all the irrigated lands within El Paso County, Texas; (c) Hudspeth District, the municipal limits of which embrace some 30 square miles of land in the extreme southwesterly portion of Hudspeth County, Texas, commencing at the El Paso Hudspeth County line, approximately 45 miles below the City of El Paso and extending down the Rio Grande River in a southeasterly direction for about 30 miles to a point a few miles above Fort Quitman. All the lands in the three districts lie within a few miles of the Rio Grande River, the Hudspeth lands being located downstream from the lands within the other two districts

2.4 The Rio Grande Project is a Government reclamation project embracing Elephant Butte Dam and Reservoir and a great network of irrigation ditches and other works between Elephant Butte Dam and the El Paso-Hudspeth County Line. All the irrigation works within Elephant Butte and El Paso Districts are operated by the Bureau of Reclamation as a part of the Rio Grande Project, those two districts having similar contracts with the United States with respect to operation and maintenance of such works El Paso District and Elephant Butte District are sometimes herein referred to jointly as the "Project Districts", the lands within those two districts as "Project lands", and the owners thereof as "Project landowners."

2.5 During recent years, the water shed of the upper Rio Grande River Valley has been afflicted with the most severe drouth of recorded history. Beginning in 1951, as a "conservation" measure, the Defendant reclamation officials cut off the flow of water to the Hudspeth farmers. As a result, agriculture within the limits of Hudspeth District has now almost completely ceased. However, it is reasonable to anticipate that some day the snows will fall again in the Rockies as of your, and that the waters of the Rio Grande will again be sufficient to provide livelihood, and even prosperity, for a large number of farmers in the Elephant Butte-Fort Quitman area. Wherefore, the matters herein set forth can become neither moot nor academic as a result of either drouth or flood, but must be judicially resolved.

2.6 A series of controversies has arisen between the Plaintiffs and the Defendants with respect to the source, character and extent of the rights of the

Hudspeth landowners, vis a-vis these of the Project landowners and of the Government, to the use of the waters of the Rio Grande River and the return flow thereof, between Elephant Butte Dam and Fort Quitman. Plaintiffs bring this action for a declaratory judgment, adjudicating the rights of the Plaintiffs in respect of the controversies hereinafter set forth, and for an injunction restraining continued interference with Plaintiff's vested water rights by Defendant reclamation officials.

III. First Controversy: State Authorization.

3.1 A controversy exists between Plaintiffs and Defendants with respect to the source, nature, and effective date of the State authorization for acquisition of appropriative water rights to the use of the waters of the Rio Grande for irrigation in Texas above Fort Quitman.

3.2 For many years, prior to the present drouth, the waters of the Rio Grande have been extensively used for irrigation of lands in El Paso District and in Hudspeth District. A portion of the water so used has been beneficially used within the limitations of a notice of intent to appropriate filed with, or of a permit to appropriate issued by the appropriate State agency. But most of the water used to irrigate Hudpeth lands, and almost all the water used to irrigate El Paso lands, has been used outside the terms of any such notice or permit. The landowners who have so made beneficial use of water outside the express terms of any notice or permit, including both El Paso landowners and Hudspeth landowners, claim appropriative rights to the continued use of such waters.

3.3 Appropriative water rights can be acquired only by consent and authority of the State, and the nature, extent and priority of the rights, appurtenant to such El Paso and Hudspeth lands, depend upon the source, nature and effective date of the State authorization for acquisition of such water rights.

3.4 Section 8 of the Reclamation Act of 1902 (43 USCA Sec. 383) requires the defendant Reclamation officials to proceed in conformity with state laws relating to the control, appropriation, use and distribution of water used in irrigation and without interference with vested rights acquired under such laws. By Section 3(e) of the Submerged Lands Act of May 22, 1953, (43 U. S. C. A. Sec. 1311) the Federal Congress re-confirmed that the control, appropriation, use and distribution of such waters should continue to be in accordance with such state laws.

3.5 Defendants Contend: That all the waters of the Rio Grande which are in the stream above the Texas line have been appropriated in conformity with the laws of New Mexico, by filing of Notices of Intent to Appropriate in 1906 and 1908 for diversion and use in Elephant Butte District in New Mexico and El Paso District in Texas; that no compliance with the laws of Texas was necessary to effectuate a complete appropriation; and that the appropriation was for the exclusive benefit of the lands within the municipal limits of Elephant Butte and El Paso Districts, and does not in any way serve to initiate rights to use water which may have been diverted from the stream through Project works, and applied to beneficial use on other lands in Texas, including specifically those within the limits of Hudspeth District.

3.6 Plaintiffs Contend: That rights to use the waters of the Rio Grande in Texas could be acquired only in conformity with the laws of Texas; that, by its confirmation of the Rio Grande Compact with respect to uses of Rio Grande water above Fort Quitman, the State of Texas waived the formal requirement of a notice of intent or a permit as a formal prerequisite to acquisition of an appropriative right to use the waters of the Rio Grande above Fort Quitman; that this waiver was with respect to all farmers who made beneficial use of the waters of the Rio Grande above Fort Quitman, prior to the effective date of the Compact, namely, May 31, 1939, including uses on Hudspeth lands, as well as on El Paso lands; that the relative priority (as against other Texas appropriations using water above Fort Quitman) of the water rights covered by said waiver is as of said May 31, 1939.

3.7 Plaintiffs Further Contend: That to the extent, if any, that the State of Texas has ratified the old New Mexico filings of 1906 and 1908, or otherwise made them effective in Texas, that such filings were effective to initiate rights to use water on Hudspeth lands in Texas, as well as on El Paso lands, because (a) use of water on the Hudspeth lands is within the literal terms of the filings, and (b) for twenty six years the defendant reclamation officials, with no State authority other than the old New Mexico filings, diverted water from the Rio Grande River through Project works in the El Paso Valley in Texas, and delivered the same to the Hudspeth District for distribution among Hudspeth farms and beneficial use upon Hudspeth lands.

IV. Second Controversy: Drainage Water.

4.01 A second controversy exists between Plaintiffs and Defendants with respect to the legal effectiveness, vel non, of claimed appropriations for beneficial use on El Paso Lands of seepage waters accumulating in certain drainage ditches within the lower portion of El Paso District and designated as the Mesa Drain, the Island Drain, the Tornillo Drain, together with their respective tributary drainage ditches.

4.02 All of the said drainage waters represent return flows of the waters of the Rio Grande which have been diverted from the stream, applied to beneficial use on El Paso lands and thence seeped through the soil and accumulated in the said drainage ditches.

4.03 Because of their high saline content, such drainage waters have always been considered less desirable for irrigation than the waters carried in the stream past the City of El Paso, and the efforts of the Defendant reclamation officials in respect to such waters prior to 1951, were always directed toward disposing of such waters, rather than making beneficial use thereof.

4.04 Prior to 1951, none of the drainage waters of the Island and Tornillo Drains were recaptured and applied to beneficial use on any lands within El Paso District. On the contrary, for approximately thirty years such waters were discharged into the river (or, after 1946, into a feeder canal of the Hudspeth District).

4.05 Prior to 1941, a significant portion of the waters of the Mesa Drain were recaptured and applied to beneficial use on lands in the extreme lower end of the El Paso District, as well as on Hudspeth lands. In 1941, however, certain structures were completed near the town of Fabens, at a cost of approximately $141,000.00, which made it easier to discharge such waters without beneficial use and much more difficult to apply them to beneficial use on any lands within El Paso District. Thereafter, up until 1951, none of the waters of the Mesa Drain were applied to any beneficial use on any El Paso lands, and all of such waters were discharged into the river (or, after 1946, into certain feeder canals of the Hudspeth District).

4.06 For more than three successive years prior to 1951, the waters of the Mesa Drain, the Island Drain and the Tornillo Drain were wilfully abandoned from the El Paso lands and the irrigation works of El Paso District, without any application to any beneficial use on any El Paso lands, and with the intent to abandon the use and the usufruct of such waters.

4.07 On the effective date of the Rio Grande Compact, and for many years theretofore and continuously thereafter until 1951, a significant portion of the waters of the Mesa, Island and Tornillo Drains were recaptured and applied to beneficial use on irrigable lands within the Hudspeth District. A substantial portion of the waters so used were used within the terms of a permit to appropriate issued by the Texas Board of Water Engineers.

4.08 In 1946 and 1947 the Hudspeth District, in cooperation with the United States State Department, constructed certain feeder canals whereby the drainage waters of the Island, Mesa and Tornillo Drains would be intercepted and carried directly to the Hudspeth District canal system, without discharge into the river from which such waters had previously been partly subject to diversion by Mexican nationals in violation of a treaty between the United States and Mexico. Thereafter, a much larger portion of the said drainage waters were applied to beneficial use on Hudspeth lands, and, indeed, such waters were the principal source of the supply of the Hudspeth farmers during 1948, 1949, and 1950.

4.09 Beginning in 1951, the Defendant reclamation officials have permitted and encouraged owners of El Paso lands, adjacent to the above described drainage systems, to pump the drainage water directly from such drains into the adjacent lands, with the result that the flow of the said drainage waters to the Hudspeth District and to the Hudspeth lands has been, since 1950, practically eliminated. Prior to 1951, none of such drainage waters were ever used on the lands on which they have been used since 1950, even the Mesa Drain waters having been used before 1941 on different El Paso lands from those on which they have been used since 1950.

4.10 Defendants Contend: That the right to use all of the above described drainage waters on any Project lands was appropriated in 1906 or 1908 and that no portion of such rights, (if any) has ever been abandoned.

4.11 Plaintiffs Contend: That no rights to use the waters of the Tornillo or Island Drains on any lands within El Paso District have ever been appropriated; that prior to 1941 the right beneficially to use only a small portion of the waters of the Mesa Drain on any El Ptso lands was apprepriated, but that the appropriative right to use even that small portion on El Paso lands was abandoned prior to 1951; that the beneficial right to use all or a substantial portion of the waters of the Mesa, Island and Tornillo Drains on Hudspeth lands was appropriated prior to 1951; and that the pumping of such drainage waters from the drains to adjacent El Paso lands since 1950 has been in violation of said appropriative rights of the Hudspeth farmers.

V. Third Controversy: Financing of Irrigation Works.

5.1 A third controversy exists between Plaintiffs and Defendants with respect to whether water rights depend upon the nature of the respective water users' schemes for financing costs of irrigation works.

5.2 The most costly facilities which are used in making Rio Grande waters available for irrigation of lands located between Elephant Butte Dam and Fort Quitman have been paid for out of the United States Treasury and without cost or liability upon any landowner or water user as such. Such facilities include Elephant Butte Dam and Reservoir, Caballo Dam and Reservoir, the rectified channel of the Rio Grande between El Paso and Fort Quitman, the canalized channel of the Rio Grande between Caballo Dam and El Paso, the All American Dam and Canal at El Paso.

5.3 The canals, drainage ditches and other local irrigation works within El Paso and Elephant Butte Districts have likewise been paid for by the United States, but such districts, pursuant to the Reclamation Act, have entered into contracts whereby liens for "construction charges", equal to the cost of such local facilities, have been levied against designated irrigable lands within such districts. The benefited landowners thereby assessed for the cost of the facilities are repaying such construction charges, without interest, over a forty-year period.

5.4 Corresponding facilities within the Hudspeth District, that is, the canals, drainage ditches and other local irrigation works, have been financed by flotation in the public market of interest-bearing bonds issued by the Hudspeth District. Taxes are assessed and collected annually from Hudspeth landowners for a sinking fund to retire such bonds.

5.5 In addition, pursuant to a Warren Act contract, the Hudspeth District has been making annual payments to the Government with respect to Project facilities used to store and carry water to the Hudspeth District for use by its farmers. Such annual payments, aggregating more than $500,000.00 have been applied to reduce the construction charges and operation and maintenance charges otherwise levied on Project lands.

5.6 Defendants Contend: That by virtue of the aforesaid financing arrangements, the landowners and water users within El Paso and Elephant Butte Districts, including those whose lands are assessed for construction charges and those whose lands are

not so assessed, are entitled to superior water rights over the Hudspeth landowners.

5.7 Plaintiffs Contend: That the respective methods of financing of the facilities has nothing to do with water rights of the farmers; and, in any event, the respective schemes afford no basis for discrimination against the Hudspeth farmers.

VI. Fourth Controversy: Interpretation of Warren Act.

6.1 A fourth controversy exists between Plaintiffs and Defendants with respect to the extent of the contractual authority of the Secretary of the Interior or his delegate, under Section 1 of the Warren Act of February 21, 1911, (36 Stat. 925, 43 U.S.C.A. sec. 523).

6.2 Said statute provides as follows:

"Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of Interior, preserving a first right to lands and entrymennunder the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operation under * * * the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water

users by the party with whom the contract is made; Provided, however, That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. * * * *"

6.3 Defendants Contend: That Section 1 of the Warren Act authorizes the Secretary by contract to subjugate (a) the usufuctuary rights to the use of water, appropriative and riparian, of farmers using water stored or carried under Warren Act contracts to (b) the water rights of Project landowners, including those whose lands are subject, and those whose lands are not subject, to "construction charges." For this construction, Defendants rely upon the statutory phrase "preserving a first right to lands and entrymen under the project."

6.4 Plaintiffs Contend: That under such statute the Secretary is authorized only to contract for the physical impounding, storage and carriage of water and has no power to contract with respect to usufructuary rights to the use of water; that the Secretary may contract to store and carry water only to the extent of the excess capacity of the Project works and must "preserve a first right" to the utilization of such storage and carrying capacity of irrigation works for irrigation of the Project lands subject to construction charges with respect to the cost of such works; but that the Government owns no proprietary or beneficial rights to the use of water, and the Secretary has no authority by contract to limit or subjugate the usufructuary rights of landowners to the use of water stored or carried under Warren Act contracts; and, indeed, that the statute prescribes

that such rights or user be consistent with rights of user with respect to lands under reclamation projects, that is, in accordance with the arid region doctrine of prior appropriation, as enunciated in the proviso to Section 8 of the Reclamation Act, to-wit: "Provided, That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (Act of June 17, 1902, 32 Stat. 390, 43 U.S.C.A. sec. 372.)

VII. Fifth Controversy: Effect of Contracts.

7.1 A fifth controversy exists between Plaintiffs and Defendants with respect to the legal effectiveness, vel non, to restrict the water rights of the Hudspeth farmers or to divest the rights from the Hudspeth lands, of certain language contained in the Warren Act contracts between the United States Government and the Hudspeth District, a municipal corporation. Said contracts were drafted by officers of the Bureau of Reclamation.

7.2 The Warren Act contract dated December 1, 1924, contains the following language:

"The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal Irrigation Project. In consideration of such rental the District hereby relinquishes alll right, title, interest and claim to any and all waters of the Rio Grande except as herein provided."

7.3 The Amendatory Contract dated April 27, 1951, contains the following and almost identical language:

"The rental of water hereunder is secondary and inferior to the right to use of waters on the Rio Grande Federal Irrigation Project for any purposes. The District hereby relinquishes to the United States all right, title, interest and claim to any and all waters of the Rio Grande vested in the District as of December 1, 1924, except as herein provided."

7.4 Defendants Contend: That the legal effect of the above quoted language from the Warren Act contracts between the Government and the Hudspeth District, a municipal corporation, is to subjugate, permanently and forever, (a) the water rights of the Hudspeth farmers, both riparian rights and appropriative rights, including those rights vested prior to December 1, 1924, those vested since that date, and those appropriative which may hereafter be perfected or acquired by the Hudspeth farmers, to (b) the water rights of all owners of all lands within the municipal limits of Elephant Butte and El Paso Districts, including such appropriative water rights as may be hereafter acquired by landowners within those districts, without regard to whether particular lands within the Project Districts are riparian or nonriparian, without regard to whether particular lands within the Project Districts have ever been irrigated, and without regard to whether particular lands within the Project Districts are subject or not subject to construction charges.

7.5 Defendants contend: That the effect of the foregoing language is, not merely to justify cutting

off the flow of water to the Hudspeth farmers in times of drought, but also to permit the indefinite expansion of the non-riparian irrigated area within Elephant Butte and El Paso Districts, with all prior vested rights of the Hudspeth farmers remaining inferior to the rights appurtenant to such added lands, with the inevitably ultimate result that no water will flow to Hudspeth lands, even in years in which water is plentiful.

7.6 Plaintiffs Contend: That under the Reclamation Laws and the Warren Act, the United States Government owns no proprietary or beneficial rights to the use of water; that the Secretary is authorized only to contract with respect to the impounding or carriage of water; and that he has no authority or power to provide by contract for restricting or subjugation of the water right of any farmer receiving water through reclamation works; that the Warren Act contracts with the Hudspeth District cannot be given any such effect.

7.7 Plaintiffs further Contend: That the Hudspeth District, a municipal corporation, although undoubtedly having the power to contract with respect to water rights and other property owned by it in its corporate capacity, had no power and could acquire no power by contract to limit or subordinate the water rights, riparian or appropriative, of the individual farmers owning land within the District limits, including water rights vested prior to 1924 and those which the farmers might perfect thereafter by beneficial use of water.

7.8 Plaintiffs Further Contend: That the aforesaid Warren Act contracts can be and must be construed so as to make them valid and enforceable, to wit: the "secondary and inferior" phraseology should be construed as a simply negativing any possible argument that the contract might have the effect of granting, of itself, any water rights superior to the then vested rights, riparian and appropriative, of Project landowners, or of, in any way, divesting the riparian or appropriative water rights of Project landowners which vested prior to 1924. Similarly the relinquishment clause can be and must be construed merely as a quitclaim by the Hudspeth District of such water rights as were owned by it in its corporate capacity as of December 1, 1924, and in no way affecting the water rights owned by the individual farmers.

VIII. Sixth Controversy: Riparian Rights.

8.1 A controversy exists between Plaintiffs and Defendants with respect to the extent to which usufructuary rights to the use for irrigation of the waters of the Rio Grande in Texas above Fort Quitman are governed by the riparian doctrine, as opposed to the arid region doctrine of prior appropriation.

8.2 Most of the El Paso and Hudspeth lands lie within surveys which were contiguous to the Rio Grande at the time of the grants from the sovereign and which lie completely within the watershed of the Rio Grande. All owners of such land have correlative and equal rights to the reasonable use for irrigation of that portion of the waters of the Rio Grande which represents the normal flow of the stream.

8.3 For years prior to the first Warren Act contract of December 1, 1924, lands within the present district limits of Hudspeth District were irrigated from the Rio Grande. Indeed, Hudspeth lands were irrigated from the Rio Grande as far back as the 1880s, long before construction of Elephant Butte Dam. And the normal flow of the Rio Grande in the El Paso Valley was theretofore sufficient for Spanish colonists to practice irrigation on the Juarez side more than two hundred years earlier.

8.4 Defendants Contend: That there is no perceptible normal flow of the Rio Grande in Texas above Fort Quitman to which riparian rights can attach, and all the flow of the river may be taken for use on El Paso lands—including non-riparian El Paso lands—regardless of the need for water on Hudspeth riparian lands.

8.5 Plaintiffs Contend: That the Rio Grande, during years of normal conditions, has a perceptible and calculable normal flow, to which the aforesaid riparian rights of user attach.

IX. Seventh Controversy: Diversions for Power.

9.1 A controversy exists between Plaintiffs and Defendants with respect to the legality, vel non, of certain diversions and consumptive uses of water by the Defendant reclamation officials for generation of hydro-electric power.

9.2 The diversions for power are brought about in this way: Caballo Dam was completed about twenty miles downstream from Elephant Butte Dam in New

Mexico in 1938. At the same time a power house and power generation facilities were constructed at Elephant Butte Dam. The practice of the Defendant reclamation officials is to release water from Elephant Butte Reservoir, thereby generating hydro-electric power at Elephant Butte Dam and to catch the waters so released in Caballo Reservoir, whence they are subsequently released for irrigation as needed. But the result of this practice is to spread out, over two reservoirs, the waters which would have otherwise been confined in only one reservoir. The spreading out of impounded waters over the area of two reservoirs causes much greater losses through evaporation and seepage than would result if the water had been impounded in only one reservoir.

9.3 The increase in the loss of water due to the operation of the power generation facilities in Elephant Butte Dam is a consumptive use of stream flow waters. However, neither the Defendant reclamation officials nor the United States Government has ever taken any step to acquire, in conformity with the laws of New Mexico, any appropriative rights consumptively so to use the waters of the Rio Grande for generation of hydro-electric power; and New Mexico has never recognized any riparian rights to the use of water.

9.4 Neither the laws of New Mexico, Texas or the United States authorize the non-compensatory taking of the usufructuary rights of downstream farmers to the use of water in order to propel Government-owned power generation facilities.

9.5 By Section 5 of the Act of April 16, 1906, (43 U.S.C.A. Sec. 322) the defendant Reclamation Of-

ficials are forbidden to make any lease "of such surplus power or power privilege as will impair the efficiency of the irrigation project."

9.6 During the irrigation seasons prior to 1951, the above described use of stream flow water for generation of power in no way interfered with the water rights of any of the farmers above Fort Quitman, because the supply of water was sufficient for all. In 1951 and in years since 1951, however, the aforesaid use of water for power has interfered with and diminished the water supply available for irrigation by the farmers downstream from Caballo Dam and above Fort Quitman, so that all the farmers have had less water than they could beneficially use.

9.7 Defendants Contend: That the Defendant reclamation officials are entitled consumptively so to use the waters of the Rio Grande.

9.8 Plaintiffs Contend: That the above described consumptive uses of water for generation of power is an unlawful invasion of the water rights of the downstream farmers, including the individual Plaintiffs and all members of the class which they represent.

X. Prayer.

Wherefore, Plaintiffs pray as follows:

10.1 That the Court enter a declaratory judgment resolving each of the foregoing controversies in accordance with the contentions of the Plaintiffs, as above stated.

10.2 In the alternative, that the Court enter a declaratory judgment resolving such of the foregoing controversies in such other manner as the Court may deem just.

10.3 That the Court enter a permanent injunction perpetually enjoining and restraining the Defendant reclamation officials, their subordinates, agents and successors from diverting water in such way as to interfere with the rights of the Plaintiffs as set forth in the Court's declaratory judgment.

10.4 That the plaintiffs recover their costs (from the defendants other than the United States) and have such other and further legal and equitable relief as the Court may deem just.

Respectfully submitted,

(S.) MORGAN HUNTER,
(Morgan Hunter).

Brown Building,
Austin, Texas.

(S.) TED ANDRESS,
(Theodore Andress),
Attorneys for Plaintiffs.

El Paso National Bank Bldg.,
El Paso, Texas.

Andress, Lipscomb, Peticolas & Fisk, El Paso, and Powell, Wirtz, Rauhut & McGinnis, Austin, Of Counsel.

CITATION—EITHER COURT—ANY COUNTY—RULES OF CIVIL PROCEDURE.

The State of Texas.

To: United States of America, by serving one copy hereof upon Hon. Herbert Brownell, Attorney General of the United States of America, Greeting:

You are commanded to appear by filing a written answer to the plaintiff's petition at or before 10 o'clock A. M. of the Monday next after the expiration of 20 days from the service hereof before the Honorable 34th District Court of Hudspeth County, at the Court House in Sierra Blanca, Texas. Said plaintiff's petition was filed on the 1st day of November, 1955. The file number of said suit being No. 1188.

The style of the case is Ronald Miller, et al., Plaintiff, versus Robert W. Jennings, et al., Defendant, A copy of plaintiff's petition accompanies this citation.

If this Citation is not served within 90 days after the date of its issuance, it shall be returned unserved.

Given under my hand and seal of said Court, at office in Sierra Blanca, Hudspeth County, Texas, and issued this the 5th day of November A. D., 1955.

BERNICE ELDER,
Clerk District Court, El Paso County, Texas,
By (S.) HELEN DWIGANS,
Deputy.

File No. 1188. 34th District Court, Hudspeth County, Texas. Citation, Ronald Miller et al., vs. Robert W. Jennings. Filed November, 195.., Bernice Elder,

Clerk District Court, Hudspeth, Texas, By ..... , Deputy.

CITATION—EITHER COURT—ANY COUNTY—RULES OF CIVIL PROCEDURE.

The State of Texas.

To: Robert W. Jennings, Regional Director of the Bureau of Reclamation, in Amarillo, Texas. Greeting:

You are commanded to appear by filing a written answer to the plaintiff's petition at or before 10 o'clock A. M. of the Monday next after the expiration of 20 days from the service hereof before the Honorable 34th District Court of Hudspeth County, at the Court House in Sierra Blanca, Texas. Said plaintiff's petition was filed on the 1st day of November, 1955. The file number of said suit being No. 1188.

The style of the case is Ronald Miller, et al., Plaintiff, versus Robert W. Jennings, et al., Defendant. A copy of plaintiff's petition accompanies this citation.

If this Citation is not served within 90 days after the date of its issuance, it shall be returned unserved.

Given under my hand and seal of said Court, at office in Sierra Blanca, Texas, and issued this the 5th day of November, A. D., 1955.

BERNICE ELDER,
Clerk District Court, Hudspeth County, Texas.
By (S.) HELEN DWIGANS,
(Seal) Deputy.

ROBERT W. JENNINGS.

Delivered 9 day of Nov. 1955. P. G. Gaither, Sheriff Potter County, Texas, (S.) J. P. LeNeven, Deputy.

DR 26591. File No. 1188. 34th District Court Hudspeth County, Texas. Citation, Ronald Miller, et al., vs. Robert W. Jennings, et al. Filed November, 195.. Bernice Elder, Clerk District Court, Hudspeth County, Texas. By ....., Deputy.

R. W. Jennings handed this document to me at 9:30 a.m. Nov. 9, 1955. (S.) Agnes Guthrie.

CITATION—EITHET COURT—ANY COUNTY—
RULES OF CIVIL PROCEDURE.

The State of Texas.

To: W. H. Resch, N. B. Phillips, L. D. McComas, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., S. Y. Wilson, individually and as representatives of all landowners or water users claiming adversely to plaintiffs in rights to the use of irrigation waters of the Rio Grande River and return flow therefrom between Elephant Butte Dam and the El Paso-Hudspeth county line, and the El Paso County Water Improvement District No. 1., Greeting:

You are commanded to appear by filing a written answer to the plaintiff's petition at or before 10 o'clock A. M. of the Monday next after the expiration of 20 days from the service hereof before the Honorable 34th District Court of Hudspeth County, at the

Court House in Sierra Blanca, Texas. Said plaintiff's petition was filed on the 1st day of November 1955. The file number of said suit being No. 1188.

The style of the case is Ronald Miller, et al., Plaintiff, versus Robert W. Jennings, et al., Defendant, A copy of plaintiff's petition accompanies this citation.

If this Citation is not served within 90 days after the date of its issuance, it shall be returned unserved.

Given under my hand and seal of said Court, at office in Sierra Blanca, Texas, and issued this the 5th day of November A. D., 1955.

BERNICE ELDER,
(Slerk) Clerk District Court, Hudspet
County, Texas,
By (S.) HELEN DWIGANS,
Deputy.

Served on (Name of Defendant Served) Mr. W. H. Resch, the 14 day of Nov., A. D., 1955, at 1 59/ o'clock P. M.

W. O. HICKS,
Sheriff, ...County,
By (S.) A. BURGOS,
Deputy.

(To be filled out on copy served.)

W. F. RESCH.

Sheriff's Return.

Came to hand on the 7 day of Nov., 1955, at 1:45 o'clock P.M., and executed ..... County, Texas by delivering to each of the within named defendants, in person, true copy of this Citation together with

the accompanying copy of the plaintiff's petition, at the following times and places, to-wit

Name .....

Date—Month ..... Day..... Year .....

Time—Hour ..... Min. ..... M.

Place, and Course and Distance from Court House .....

Mileage .....

And not executed as to the defendant ..., ... the diligence used in finding said defendant ...., being: ..... and the cause of failure to execute this process is: ..... and the information received as to the whereabouts of the said defendant..., being: .....

I actually and necessarily traveled .... miles in the service of this Citation, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

I indorsed on each of the Citations served the day and hour when served.

Fees—Serving ..... Cop ....., $.....
Mileage .....miles, ...

Total, $.....

.....,
(Sheriff, Constable),
El Paso County, Texas,

By .....,
Deputy.

File No. 1188. 34th District Court El Paso County, Texas, Citation, Ronald Miller, et al., vs. Robert W. Jennings, et al. Filed November, 1955, Bernice Elder, Clerk District Court, Hudspeth County, Texas, By ....., Deputy.

CITATION—EITHER COURT—ANY COUNTY—
RULES OF CIVIL PROCEDURE.

The State of Texas.

To: United States of America, by serving one copy of process with Plaintiffs' Petition attached on Holvey Williams, Esq., Assistant United States District Attorney for the Western District of Texas, at El Paso, Greeting:

You are commanded to appear by filing a written answer to the plaintiff's petition at or before 10 o'clock A. M. of the Monday next after the expiration of 20 days from the service hereof before the Honorable 34th. District Court of Hudspeth County, at the Court House in Sierra Blanca, Texas. Said plaintiff's petition was filed on the 1st day of November, 1955. The file number of said suit being No. 1188.

The style of the case is Ronald Miller, et al., Plaintiff, versus Robert W. Jennings, et al., Defendant, A copy of plaintiff's petition accompanies this citation.

If this Citation is not served within 90 days after the date of its issuance, it shall be returned unserved.

Given under my hand and seal of said Court, at office in Sierra Blanca, Texas, and issued this the 5th day of November, A. D., 1955.

BERNICE ELDER,
Clerk District Court, Hudspeth County, Texas,
By (S.) HELEN DWIGANS,
(Seal) Deputy.

Served on (Name of Defendant Served) Holvey Williams, the 7 day of Nov., A. D., 1955, at 2:15 o'clock A. M.

W. O. HICKS,
Sheriff El Paso, County,
By (S.) GEO AUBOFF,
Deputy.

(To be filled out on copy served.)

WILLIAMS.

Sheriff's Return.

Came to hand on the 7 day of Nov., 1955, at 1:45 o'clock P. M., and executed ..... County, Texas by delivering to each of the within named defendants, in person, true copy of this Citation together with the accompanying copy of the plaintiff's petition, at the following times and places, to-wit

Name .....

Date—Month ..... Day .... Year .....

Time—Hour ..... Min. ..... M.

Place, and Course and Distance from Court House .....

Mileage— .....

And not executed as to the defendant..., ... the diligence used in finding said defendant...., being: ..... and the cause of failure to execute this process is: ..... and the information received as to the whereabouts of the said defendant ....., being: .....

I actually and necessarily traveled ..... miles in the service of this Citation, in addition to any other mileage I may have traveled in the service of other process in the same case during the same trip.

I indorsed on each of the Citations served the day and hour when served.

Fees—Serving .....Cop ....., $.....
Mileage .....miles, ...

Total, $.....

.....,
(Sheriff, Constable),
El Paso County, Texas.

By .....,
Deputy.

File No. 1188. 34th District Court Hudspeth County, Texas. Citation, Ronald Miller, et al., vs. Robert W. Jennings, et al. Filed November, 1955, Bernice Elder, Clerk District Court, Hudspeth County, Texas, By ....., Deputy.

CO-PETITION FOR REMOVAL.

(Filed November 25, 1955.)

To the Honorable Judge of the United States District Court for the Western District of Texas, El Paso Division:

Now come T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., S. Y. Wilson, El Paso County Water Improvement District No. 1, and N. B. Phillips, who, together with Robert W. Jennings, W. F. Resch, and the United States of America, are all of the defendants named in that suit hereinafter described, and respectfully show to the Court:

1.

On the 1st day of November, 1955, there was filed in the District Court of Hudspeth County, Texas, Thirty-Fourth Judicial District, a certain cause numbered 1188 on the docket of that Court under the style of "Ronald Miller, et al., Plaintiffs, vs. Robert W. Jennings, et al., Defendants" being the same action as above captioned, wherein the plaintiffs seek to establish against your co-petitioners named herein, together with Robert W. Jennings, W. F. Resch, and the United States of America, certain claimed priorities and rights to waters of the Rio Grande and waters of the Rio Grande Federal Reclamation Project in New Mexico and Texas, including storm and flood waters, and drainage and return flow and rights under contracts between the United States of America and the Hudspeth County Conservation

and Reclamation District No. 1, and for claimed riparian rights in said stream and challenging the right of the United States to generate hydro-electric power at Elephant Butte Dam in New Mexico, and wherein the plaintiffs seek to establish other claims as shown in said petition and a declaratory judgment respecting the claimed rights and injunctive relief against certain defendants who are officers of the United States Bureau of Reclamation, other defendants as individuals having been made parties because they are alleged to be land owners and water users of the Rio Grande Project and are sued as representatives of all owners or irrigators of land within said Project, of which defendant El Paso County Water Improvement District No. 1, as the Texas unit of said Project, is alleged to be a Texas municipal corporation organized for the purpose of contracting with the United States respecting Texas lands. All of plaintiffs' contentions are more fully shown by the true copy of Plaintiffs' Original Petition filed as Exhibit A accompanying this co-petition, and reference is here made thereto for a more complete statement of the nature of said action.

2.

Before the commencement of said action and continuously to date, the defendant Robert W. Jennings occupied and now holds the official position of Regional Director of Region 5 of the Bureau of Reclamation, United States Department of the Interior, and defendant W. F. Resch has been and is now the Project Manager of the Rio Grande Project which is a Federal Irrigation and Reclamation Project constructed and operated by the defendant United States

of America. Both of said defendants are officers of the Bureau of Reclamation, Department of the Interior, which Bureau is an agency of the United States, and at all times mentioned in said action by plaintiffs said two defendants were acting solely under color of their respective officers and all of their acts in connection with the matters charged in said petition were performed by them and each of them under color of their respective offices and not as individuals. Simultaneously with the filing of this co-petition there is being filed herewith a petition by the United States of America, Robert W. Jennings and W. F. Resch for removal of said suit from said State Court in Hudspeth County, Texas, to this honorable Court, and your co-petitioners hereby assent to, consent to, and join in said petition for removal by the United States and Bureau of Reclamation officials by the filing of this co-petition to be considered therewith.

3.

Plaintiffs' Original Petition also shows on its face that it is an action founded on claims or rights arising under the Constitution, treaties or laws of the United States, and that it is a suit against the United States.

4.

The value of the water rights sought to be established by the plaintiffs is far in excess of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

5.

Co-petitioners have been served with process in said suit, i.e., with a copy of plaintiffs' petition and a citation served on each defendant as follows:

T. D. Lovelady—on November 8, 1955.

Louise Young Lovelady—on November 8, 1955.

Francis J. Warnock—on November 14, 1955, but his name is not indorsed on such copy by officer.

J. S. Samples—on November 14, 1955.

Mariin Briggs—on November 10, 1955, but his name was not indorsed on such copy by officer serving it.

Lee Moor—on November 14, 1955.

Gowan Jones—on November 10, 1955.

Will Holt—on November 10, 1955.

Tom Holmsley—on November 10, 1955, but copy was not indorsed to show delivery to him.

Paul Harvey, Sr.,—on November 10, 1955.

S. Y. Wilson—on November 10, 1955.

El Paso County Water Improvement District No. 1—on November 7, 1955, by delivery of a copy to N. B. Phillips, and on November 9, 1955, by delivery of a copy to L. D. McComas, its president.

N. B. Phillips—on November 7, 1955.

In addition to service of process on co-petitioners on the dates above shown, the plaintiffs also caused defendant Robert W. Jennings as Regional Director of the Bureau of Reclamation in Amarillo, Texas, to be served with a copy of petition and citation on November 9, 1955, and defendant W. F. Resch, Rio Grande Project Manager, whose name incorrectly appears in the citation as "W. H. Resch" was served with a copy thereof on November 14, 1955, while service was undertaken upon the United States in Washington, D. C., by delivery of a copy of plaintiffs' petition and citation to the Attorney General at a date later than November 5, 1955, as shown more fully in the petition for removal filed simultaneously herewith by defendants the United States, Jennings and Resch.

None of the defendants named in said suit in the state Court has appeared or answered therein and the time for doing so has not expired as to any defendant, and while each was served with a copy of Plaintiffs' Original Petition by its being attached to the copy of the citation served on each defendant, no defendant received or was otherwise served with a copy of said Plaintiffs' Original Petition which was and is plaintiffs' initial pleading setting forth the claim for relief upon which such action by plaintiffs is founded, and the petition for removal and this co-petition for removal both are filed within twenty days from date of first receipt by any defendant through service or otherwise of a copy of plaintiffs' initial pleading, and within twenty days from date of first service of summons upon any defendant in said cause.

6.

This co-petition, together with the petition for removal filed at the same time by the United States, Jennings and Resch, is accompanied by a bond with good and sufficient surety, conditioned that all petitioners will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that this action was not removable or was improperly removed.

7.

Filed herewith, and marked Exhibit A as above mentioned, is a copy of Plaintiffs' Original Petition which was served with citation or summons on each defendant herein, and also filed herewith and marked Exhibit B is the copy of the citation which was served on each co-petitioner named herein which, together with the copies filed in connection with the petition for removal by the United States and Robert W. Jennings and W. F. Resch, its Bureau of Reclamation Officials, constitute all process, pleadings and orders served upon all defendants in this action.

8.

Wherefore, co-petitioners named herein join with the United States and its officers in praying that said action may be removed from said state Court into this Court for trial and determination as provided by Title 28, Section 1441, Section 1442, Section 1446, and other provisions of Chapter 89 of said Title 28 of the United States Code.

Dated this 25th day of November, 1955.

T. D. LOVELADY,
LOUISE YOUNG LOVELADY,
FRANCIS J. WARNOCK,
J. S. SAMPLES,
MARION BRIGGS,
LEE MOOR,
GOWAN JONES,
WILL HOLT,
TOM HOLMSLEY,
PAUL HARVEY, SR.,
S. Y. WILSON,
EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1,
N. B. PHILLIPS,
By LOUIS A. SCOTT,
Of BURGES, SCOTT, RASBERRY & HULSE,
1100 First National Building,
El Paso, Texas.

and

By EUGENE T. EDWARDS,
Of EDWARDS, BELK, HUNTER & KERR,
(S.) EUGENE T. EDWARDS.

11th Floor, Bassett Tower,
El Paso, Texas.

State of Texas,
El Paso County.

N. B. Phillips, being duly sworn, states that he is one of the defendants in the above cause; that he

makes this affidavit in his own behalf and in behalf of all other defendants named hereinabove as co-petitioners for removal, he being so authorized; that he has read the foregoing co-petition for removal, is acquainted with the contents thereof, and the statements of fact therein contained are true and correct.

(S.) N. B. PHILLIPS.

Subscribed and Sworn To before me by he said N. B. Phillips this 25th day of November, 1955.

(S.) MARY R. BRADLEY,
(Mary R. Bradley),
Notary Public in and for
El Paso County, Texas.

(Seal)

State of Texas,
El Paso County.

Eugene T. Edwards, being duly sworn, states that he is one of the attorneys of record for all of the within named defendants except the United States of America, Jennings and Resch; that he makes this affidavit in behalf of said defendants as co-petitioners for removal, he being so authorized; that he has read the foregoing co-petition for removal, is acquainted with the contents thereof, and the statements of fact herein contained are true and correct.

(S.) EUGENE T. EDWARDS.

Subscribed And Sworn To before me by Eugene T. Edwards, this 25th day of November, 1955.

(S.) MARY R. BRADLEY,
(Mary R. Bradley),
Notary Public in and for El
Paso County, Texas.

(Seal)

REMOVAL BOND.

(Filed November 25, 1955.)

Know All Men By These Presents:

That we, Robert W. Jennings, W. F. Resch, T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples. Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., S. Y. Wilson, El Paso County Water Improvement District No. 1, and N. B. Phillips, being all of the defendants other than the United States, named in the above cause, as principals, and the others undersigned as surety, are held and firmly bound unto Hudspeth County Conservation & Reclamation District No. 1, Ronald Miller, W. F. Hargrove, Jr., J. B. Williams, Kenneth Jones and Lenox W. Moore, who are all of the plaintiffs named in the above entitled cause, their heirs, successors and assigns, in the sum of Five Hundred Dollars ($500.00), lawful money of the United States of 'America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

The condition of this obligation, however is such that:

Whereas, the defendants in the aboye entitled cause, including the United States of America and all defendants above named, have applied by petition to the District Court of the United States for the Western District of Texas, El Paso Division, for the removal of a certain cause pending in the District Court of

Hudspeth County, Texas, Thirty-Fourth Judicial District, numbered 1188 on the docket of that Court, under the style of "Ronald Miller, et al., Plaintiffs, vs. Robert W. Jennings, et al., Defendants," to the District Court of the United States for the Western Disrict of Texas, El Paso Division, for further proceedings on the grounds in said petition set forth:

Now, Therefore, if petitioners, being the defendants in said cause above named, shall pay all costs and disbursements incurred by reason of the removal proceedings if it should be determined that the cause was not removable or was improperly removed to said District Court of the United States, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, we, the principals and surety, have caused this instrument to be executed and our hands and seals affixed thereto this 25th day of November, 1955.

ROBERT W. JENNINGS and W. F. RESCH,
By RUSSELL B. WINE,
United States Attorney for the Western District of Texas, their attorney and agent.
By (S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant United States Attorney, Western District of Texas, Their attorney and agent.

T. D. LOVELADY, LOUISE YOUNG LOVELADY, FRANCIS J. WARNOCK, J. S. SAMPLES, MARION BRIGGS, LEE MOOR, GOWAN JONES, WILL HOLT, TOM HOLMSLEY, PAUL HARVEY, SR., S. Y. WILSON, EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, and N. B. PHILLIPS,

By (S.) EUGENE T. EDWARDS,
(Eugene T. Edwards),
Their Attorney and Agent.

GENERAL CASUALTY COMPANY OF AMERICA,
Surety,

Seattle, Washington.

By (S.) LOUIS A. SCOTT, JR.,
(Louis A. Scott, Jr.),
Attorney in Fact.

(Seal)

PROOF OF SERVICE OF REMOVAL PAPERS.

(Filed November 28, 1955.)

State of Texas,
El Paso County.

Before Me, the undersigned authority, on this day personally appeared Eugene T. Edwards, who first having been duly sworn by me, states that he is one of the attorneys of record for defendants in the above

entitled and numbered cause and that following the filing in this Court on November 25, 1955, of the Petition for Removal by the defendants United States of America, Robert W. Jennings and W. F. Resch with its exhibits, together with the Co-Petition for Removal by defendants El Paso County Water Improvement District No. 1 and all additional defendants with its exhibits, and with Removal Bond executed by all defendants except the United States of America, he promptly served all of the same on all adverse parties on November 26, 1955 in the following manner:

1. By delivery to Theodore Andress, Esq., an attorney for plaintiffs, in person, written notice of the filing of such removal papers, (a copy of which notice is attached hereto), together with a certified copy of the Petition for Removal, and Co-Petition for Removal with all exhibits to both above mentioned, and Removal Bond.

2. By mailing through registered United States mail, properly stamped and addressed to Morgan Hunter, Esq., Brown Building, Austin, Texas, (the other attorney for plaintiffs, this being his last known address and being the address furnished by him of record in this cause), written notice of the filing of the removal papers, (a copy of which notice is attached hereto), together with a certified copy of the Petition for Removal and Co-Petition for Removal with all exhibits to both above mentioned, and Removal Bond.

Affiant further states that he promptly filed with the Clerk of the State Court, being District Court of

Hudspeth County, Texas, Thirty-Fourth Judicial District, at the office of said Clerk in Sierra Blanca, Texas, on November 26, 1955, a certified copy of the Petition for Removal and Co-Petition for Removal, with all exhibits to both above mentioned, and Removal Bond, as shown by the Clerk's receipt attached hereto.

(S.) EUGENE T. EDWARDS,
(Eugene T. Edwards).

Sworn To and Subscribed by Eugene T. Edwards before me this 28th day of November, A.D. 1955.

(S.) MARY R. BRADLEY,
(Mary R. Bradley),
(Seal) Notary Public, El Paso County, Texas.

My Commission expires: June 1, 1957.

Edwards, Belk, Hunter & Kerr
Lawyers
Eleventh Floor Bassett Tower
El Paso, Texas

November 25, 1955.

Theodore Andress, Esq.
El Paso National Bank Bldg.
El Paso, Texas
Morgan Hunter, Esq.
Brown Building
Austin, Texas

Re: Ronald Miller et al., Plaintiffs, vs. Robert W. Jennings et al., Defendants, No. 1188 in the Dis-

trict Court of Hudspeth County, Texas, 34th Judicial District.

Gentlemen:

The above styled and numbered case has been removed to the United States District Court for the Western District of Texas, El Paso Division.

We enclose to each of you Notice of Removal and copy of the petitions for removal which were filed on this date, together with copy of removal bond.

Yours very truly,

EUGENE T. EDWARDS,
(Eugene T. Edwards),
HOLVEY WILLIAMS,
(Holvey Williams).

NOTICE OF REMOVAL.

In the District Court of Hudspeth County, Texas, 34th Judicial District.

Ronald Miller, et al., Plaintiffs,
vs. No. 1188.
Robert W. Jennings, et al., Defendants.

To: Theodore Andress, Esq., El Paso National Bank Bldg., El Paso, Texas; Morgan Hunter, Esq., Brown Building, Austin, Texas, Attorneys for Plaintiffs.

Please take notice that the above cause which was No. 1188 on the docket of the District Court of Hudspeth County, Texas, 34th Judicial District, has this

date been removed to the United States District Court for the Western District of Texas, El Paso Division, pursuant to the federal statutes relating to the removal of cases. A copy of the petitions for removal filed therein is attached hereto for the information of each of you, together with copy of removal bond.

Dated at El Paso, Texas, this 25th day of November, 1955.

RUSSELL B. WINE,
United States Attorney for the Western District of Texas,
and
HOLVEY WILLIAMS,
Assistant United States Attorney for the Western District of Texas,
Attorneys for the United States of America, Robert W. Jennings and W. F. Resch.

By HOLVEY WILLIAMS,
LOUIS A. SCOTT,
Of BURGES, SCOTT, RASBERRY & HULSE,

1100 First National Building,
El Paso, Texas.

and

EUGENE T. EDWARDS,
Of EDWARDS, BELK, HUNTER & KERR,
By EUGENE T. EDWARDS.
Attorneys for all other defendants in said cause.

11th Floor—Bassett Tower,
El Paso, Texas.

In the United States District Court for the Western District of Texas, El Paso Division.

Ronald Miller, et al., Plaintiffs,
v. Civil Action No. 1683.
Robert W. Jennings, et al., Defendants.

I, Bernice Elder, Clerk of the District Court of Hudspeth County, Texas, Thirty-Fourth Judicial District, acknowledge receipt by me on this 26th day of November, 1955, of a duly certified copy of each of the following papers and documents in the above styled and numbered cause:

1. Petition for Removal by the United States of America, Robert W. Jennings and W. F. Resch, together with exhibits accompanying and attached to same.

2. Co-Petition for Removal by T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., S. Y. Wilson, El Paso County Water Improvement District No. 1, and N. B. Phillips.

3. Removal Bond by Robert W. Jennings, W. F. Resch, T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., S. Y. Wilson, El Paso County Water Improvement District No. 1, and N. B. Phillips.

(S.) BERNICE M. ELDER,
(Bernice Elder),
Clerk of the District Court of
Hudspeth County, Texas,
34th Judicial District.

LEAVE TO FILE PLAINTIFFS' FIRST AMENDED COMPLAINT.

(Filed March 1, 1956.)

It is ordered that leave and permission be, and same is hereby, granted to file in this cause Plaintiffs' First Amended Complaint, copies of which have been served on Defendants.

Signed and Entered this 1st day of March, A. D. 1956.

(S.) R. E. THOMASON,
Judge, United States District Court, Western District of Texas, El Paso Division.

PLAINTIFFS' FIRST AMENDED COMPLAINT.

(Filed March 1, 1956.)

To the Honorable Judge of Said Court:

Come now, Ronald Miller and the other plaintiffs herein named, complaining of Robert W. Jennings and the other defendants herein named, and for cause of action would show the Court the following:

I. Parties.

1.1 Plaintiff Hudspeth County Conservation & Reclamation District No. 1 (herein called "Hudspeth District") is a municipal corporation organized under the laws of Texas for the purpose of constructing, owning, maintaining and operating irrigation and

drainage works for the benefit of lands within the district limits (herein called "Hudspeth lands").

1.2 Plaintiffs Ronald Miller, W. F. Hargrove, Jr., J. B. Williams, Kenneth Jones and Lenox W. Moore are individual citizens of the State of Texas and residents of Hudspeth County. The said individual Plaintiffs are owners of and water users on Hudspeth lands and bring this action on behalf of themselves and all other Hudspeth landowners and water users similarly situated. The said Hudspeth landowners and water users number approximately 90, and it is therefore impractical to bring them all before the Court.

1.3 Defendant Robert W. Jennings is a resident of Potter County, and defendant W. F. Resch is a resident of El Paso County. They are respectively, Regional Director of the Bureau of Reclamation and Project Manager of the Rio Grande Project. Defendant Jennings had general supervision over all operations of the Bureau in Texas and New Mexico, including the Rio Grande Project. Defendant Resch has direct supervision over the operations of the Project under the general supervision of Defendant Jennings.

1.4 Defendants T. D. Lovelady and Louise Young Lovelady, are residents of Hudspeth County; defendants Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., and S. Y. Wilson are residents of El Paso County. They are owners of and water users on lands lying below Elephant Butte Dam and above the El Paso County-Hudspeth County Line which are irrigated or irrigable from the Rio Grande River. Defendant El Paso County Water Improve-

ment District No. 1 (herein called "El Paso District") is a municipal corporation organized under the laws of Texas and for the purpose of contracting with the United States with respect to the water supply of lands within its district limits (herein called "El Paso lands") and, pursuant to such contracts, collecting moneys from its water users and paying them over to the United States. Defendant N. B. Phillips, a resident of El Paso County, is Manager of El Paso District. Said Defendants are sued individually and as representatives of all landowners or water users claiming adversely to Plaintiffs in rights to the use for irrigation of the waters of the Rio Grande (or the return flow therefrom) between Elephant Butte Dam and the El Paso Hudspeth County line. The said adverse claimants number more than one thousand, many of whom reside outside the State of Texas, and it is therefore impractical to bring them all before the Court.

1.5 In the alternative, Plaintiffs allege that the defendants named in the immediately preceding paragraph fairly represent and are sued individually and as representatives of all landowners or water users claiming adversely to Plaintiffs in rights to the use for irrigation of the waters of the Rio Grande (or the return flow therefrom) in Texas above the El Paso-Hudspeth County line. The said adverse claimants number more than one thousand, and it is therefore impractical to bring them all before the Court.

1.6 Defendant the United States of America (herein called "the Government") is a public corporation. This is a suit (a) for the adjudication of rights to the use of water of a river system or other source, or (b) for the administration of such rights. The

United States is the owner of certain rights to the use of water on about 400 acres of land comprising the Federal Detention Farm at La Tuna, Texas. The Government claims to be the owner of a right to the use of water to propel Government-owned power facilities at Elephant Butte Dam. The United States is a necessary party to this suit. By Section 208 of the Act of July 10, 1952, 62 Stat. 560, 43 U.S.C.A. sec. 666 the United States consented to be joined as a party defendant in suits such as this.

II. Introductory.

2.1 Elephant Butte Dam, located on the Rio Grande River in New Mexico about 125 miles above the City of El Paso, is owned by the United States and operated by the Bureau of Reclamation as a part of the Rio Grande Project. Elephant Butte Dam impounds and stores the waters of the Rio Grande in Elephant Butte Reservoir, which is one of the great storage reservoirs of the country.

2.2 Fort Quitman, Texas, is the site of an abandoned state coach post on the river about 85 miles below the City of El Paso, a few miles below the foot of Hudspeth District, at the foot of the El Paso Valley, and near the head of Box Canyon. Over the course of many years, treaties, conventions, compacts, statute and regulations have established Fort Quitman as a juristic division point between the Upper Rio Grande River and the Lower Rio Grande River.

2.3 The area between Elephant Butte Dam and Fort Quitman lies in one of the most arid regions in the United States, having an average annual rainfall

of less than nine inches. Agriculture in the area is entirely dependent upon irrigation. Most of the lands hitherto irrigated from the Rio Grande in the Elephant Butte-Fort Quitman area lie within the municipal limits of three contiguous irrigation districts: (a) Elephant Butte Irrigation District of New Mexico (herein called "Elephant Butte District"), the municipal limits of which embrace substantially all the irrigated lands in New Mexico; (b) El Paso District, the municipal limits of which embrace substantially all the irrigated lands within El Paso County, Texas; (c) Hudspeth District, the municipal limits of which embrace some 30 square miles of land in the extreme southwesterly portion of Hudspeth County, Texas, commencing at the El Paso-Hudspeth County line, approximately 45 miles below the City of El Paso and extending down the Rio Grande River in a southeasterly direction for about 30 miles to a point a few miles above Fort Quitman. All the lands in the three districts lie within a few miles of the Rio Grande River, the Hudspeth lands being located downstream from the lands within the other two districts.

2.4 The Rio Grande Project is a Government reclamation project embracing Elephant Butte Dam and Reservoir and a great network of irrigation ditches and other works between Elephant Butte Dam and the El Paso-Hudspeth County line. All the irrigation works within Elephant Butte and El Paso Districts are operated by the Bureau of Reclamation as a part of the Rio Grande Project, those two districts having similar contracts with the United States with respect to operation and maintenance of such works. El Paso District and Elephant Butte District are sometimes herein referred to jointly as the "Proj-

ect "Districts", the lands within those two districts as "Project lands", and the o. ners thereof as "Project landowners."

2.5 During recent years, the water shed of the upper Rio Grande River Valley has been af...cted with the most severe drouth of recorded history. Beginning in 1951, as a "conservation" measure, the Defendant reclamation officials cut off the flow of water to the Hudspeth farmers. As a result, agriculture within the limits of Hudspeth District has now almost completely ceased. However, it is reasonable to anticipate that some day the snows will fall again in the Rockies as of yore, and that the waters of the Rio Grande will again be sufficient to provide livelihood, and even prosperity, for a large number of farmers in the Elephant Butte-Fort Quitman area. Wherefore, the matters herein set forth can become neither moot nor academic as a result of either drough of flood, but must be judicially resolved.

2.6 A series of controversies has arisen between the Plaintiffs and the Defendants with respect to the source, character and extent of the rights of the Hudspeth landowners, vis-a-vis those of El Paso County landowners and of the Government, to the use of the waters of the Rio Grande River and the return flow thereof, between Elephant Butte Dam and Fort Quitman. Plaintiffs bring this action for a declaratory judgment, and injunction, adjudicating the rights of the Plaintiffs (individually and as members of a class) to the use of such waters vis-a-vis the named defendants (individually and as members of the class which they fairly represent), and restraining continued interference with Plaintiffs' vested water rights be Defendant reclamation officials. For

such interference Plaintiffs have no adequate remedy at law.

III. First Controversy: State Authorization.

3.1 A controversy exists between Plaintiffs and Defendants with respect to the source, nature, and effective date of the State authorization for acquisition of appropriative water rights to the use of the waters of the Rio Grande for irrigation in Texas above Fort Quitman.

3.2 For many years, prior to the present drouth, the waters of the Rio Grande have been extensively used for irrigation of lands in El Paso District and in Hudspeth District. A portion of the water so used has been beneficially used within the limitations of a notice of intent to appropriate filed with, or of a permit to appropriate issued by the appropriate State agency. But most of the water used to irrigate Hudspeth lands, and almost all the water used to irrigate El Paso lands, has been used outside the terms of any such notice or permit. The landowners who have so made beneficial use of water outside the express terms of any notice or permit, including both El Paso landowners and Hudspth landowners, claim appropriative rights to the continued use of such waters.

3.3 Appropriative water rights can be acquired only by consent and authority of the State, and the nature, extent and priority of the rights, appurtenant to such El Paso and Hudspeth lands, depend upon the source, nature and effective date of the State authorization for acquisition of such water rights.

3.4 Section 8 of the Reclamation Act of 1902 (43 USCA Sec. 383) requires the defendant Reclamation officials to proceed in conformity with state laws relating to the control, appropriation, use and distribution of water used in irrigation and without interference with vested rights acquired under such laws. By Section 3(e) of the Submerged Lands Act of May 22, 1953, (43 U.S.C.A. Sec. 1300) the Federal Congress re-confirmed that the control, appropriation, use and distribution of such waters should continue to be in accordance with such state laws.

3.5 Defendants Contend: That all the waters of the Rio Grande which are in the stream above the Texas line have been appropriated in conformity with the laws of New Mexico, by filing of Notices of Intent to Appropriate in 1906 and 1908 for diversion and use in Elephant Butte District in New Mexico and El Paso District in Texas; that no compliance with the laws of Texas was necessary to effectuate a complete appropriation; and that the appropriation was for the exclusive benefit of the lands within the municipal limits of Elephant Butte and El Paso Districts, and does not in any way serve to initiate rights to use water which may have been diverted from the stream through Project works, and applied to beneficial use on other lands in Texas, including specifically those within the limits of Hudspeth District.

3.6 Plaintiffs Contend: That rights to use the waters of the Rio Grande in Texas could be acquired only in conformity with the laws of Texas; that, by its confirmation of the Rio Grande Compact with respect to uses of Rio Grande Water above Fort Quitman, the State of Texas waived the formal requirement of a notice of intent or a permit as a formal

prerequisite to acquisition of an appropriative right to use the waters of the Rio Grande above Fort Quitman; that this waiver was with respect to all farmers who made beneficial use of the waters of the Rio Grande above Fort Quitman, prior to the effective date of the Compact, namely, May 31, 1939, including uses on Hudspeth lands, as well as on El Paso lands, that the relative priority (as against other Texas appropriations using water above Fort Quitman) of the water rights covered by said waiver is as of said May 31, 19

3.7 Plaintiffs Further Contend: That to the extent, if any, that the State of Texas has ratified the old New Mexico filings of 1906 and 1908, or otherwise made them effective in Texas, that such filings were effective to initiate rights to use water on Hudspeth lands in Texas, as well as on El Paso lands, because (a) use of water on the Hudspeth lands is within the literal terms of the filings, and (b) for twenty-six years the defendant reclamation officials, with no State authority other than the old New Mexico filings, diverted water from the Rio Grande River through Project works in the El Paso Valley in Texas, and delivered the same to the Hudspeth District for distribution among Hudspeth farms and beneficial use upon Hudspeth lands.

IV. Second Controversy: Drainage Water.

4.01 A second controversy exists between Plaintiffs and Defendants with respect to the legal effectiveness, vel non, of claimed appropriations for beneficial use on El Paso lands of seepage waters accumulating in certain drainage ditches within the

lower portion of El Paso District and designated as the Mesa Drain, the Island Drain, the Tornillo Drain, together with their respective tributary drainage ditches.

4.02 All of the said drainage waters represent return flows of the waters of the Rio Grande which have been diverted from the stream, applied to beneficial use on El Paso lands and thence seeped through the soil and accumulated in the said drainage ditches.

4.03 Because of their high saline content, such drainage waters have always been considered less desirable for irrigation than the waters carried in the stream past the City of El Paso, and the efforts of the Defendant reclamation officials in respect to such waters, prior to 1951, were always directed toward disposing of such waters, rather than making beneficial use thereof.

4.04 Prior to 1951, none of the drainage waters of the Island and Tornillo Drains were recaptured and applied to beneficial use on any lands within El Paso District. On the contrary, for approximately thirty years such waters were discharged into the river (or, after 1946, into a feeder canal of the Hudspeth District).

4.05 Prior to 1941, a significant portion of the waters of the Mesa Drain were recaptured and applied to beneficial use on lands in the extreme lower end of the El Paso Distri ., as well as on Hudspeth lands. In 1941, however, certain structures were completed near the town of Fabens, at a cost of approximately $141,000.00, which made it easier to discharge such waters without beneficial use and much more

difficult to apply them to beneficial use on any lands within El Paso District. Thereafter, up until 1951, none of the waters of the Mesa Drain were applied to any beneficial use on any El Paso lands, and all of such waters were discharged into the river (or, after 1946, into certain feeder canals of the Hudspeth District).

4.06 For more than three successive years prior to 1951, the waters of the Mesa Drain, the Island Drain and the Tornillo Drain were wilfully abandoned from the El Paso lands and the irrigation works of El Paso District, without any application to any beneficial use on any El Paso lands, and with the intent to abandon the use and the usufruct of such waters.

4.07 On the effective date of the Rio Grande Compact, and for many years theretofore and continuously thereafter until 1951, a significant portion of the waters of the Mesa, Island and Tornill Drains were recaptured and applied to beneficial use on irrigable lands within the Hudspeth District. A substantial portion of the waters so used were used within the terms of a permit to appropriate issued by the Texas Board of Water Engineers.

4.08 In 1946 and 1947 the Hudspeth District, in cooperation with the United States State Department, constructed certain feeder canals whereby the drainage waters of the Island, Mesa and Tornillo Drains would be intercepted and carried directly to the Hudspeth District canal system, without discharge into the river from which such waters had previously been partly subject to diversion by Mexican nationals in violation of a treaty between the United States and Mexico. Thereafter, a much larger portion of the

said drainage waters were applied to beneficial use on Hudspeth lands, and, indeed, such waters were the principal source of the supply of the Hudspeth farmers during 1948, 1949, and 1950.

4.09 Beginning in 1951, the Defendant reclamation officials have permitted and encouraged owners of El Paso lands, adjacent to the above described drainage systems to pump the drainage water directly from such drains onto the adjacent lands, with the result that the flow of the said drainage waters to the Hudspeth District and to the Hudspeth lands has been, since 1950, practically eliminated. Prior to 1951, none of such drainage waters were ever used on the lands on which they have been used since 1950, even the Mesa Drain waters having been used before 1941 on different El Paso lands from those on which they have been used since 1950.

4.10 Defendants Contend: That the right to use all of the above described drainage waters on any Project lands was appropriated in 1906 or 1908 and that no portion of such rights, (if any) has ever been abandoned.

4.11 Plaintiffs Contend: That no rights to use the waters of the Tornillo or Island Drains on any lands within El Paso District have ever been appropriated; that prior to 1941 the right beneficially to use only a small portion of the waters of the Mesa Drain on any El Paso lands was appropriated, but that the appropriative right to use even that small portion on El Paso lands was abandoned prior to 1951; that the beneficial right to use all or a substantial portion of the waters of the Mesa, Island and Tornillo Drains on Hudspeth lands was appropriated prior to 1951; that,

in any event, the defendants are estopped to deny the rights of the Hudspeth landowners to take and use all of said drainage waters that can be beneficially used on Hudspeth lands; and that the pumping of such drainage waters from the drains to adjacent El Paso lands since 1950 has been in violation of said appropriative rights of the Hudspeth farmers.

V. Third Controversy: Financing of Irrigation Works.

5.1 A third controversy exists between Plaintiffs and Defendants with respect to whether water rights depend upon the nature of the respective water users' shemes for financing costs of irrigation works.

5.2 The most costly facilities which are used in making Rio Grande waters available for irrigation of lands located between Elephant Butte Dam and Fort Quitman have been paid for out of the United States Treasury and without cost or liability upon any landowner or water user as such. Such facilities include Elephant Butte Dam and Reservoir, Caballo Dam and Reservoir, the rectified channel of the Rio Grande between El Paso and Fort Quitman, the canalized channel of the Rio Grande between Caballo Dam and El Paso, the All American Dam and Canal at El Paso.

5.3 The canals, drainage ditches and other local irrigation works within El Paso and Elephant Butte Districts have likewise been paid for by the United States, but such districts, pursuant to the Reclamation Act, have entered into contracts whereby liens for "construction charges", equal to the cost of such local facilities, have been levied against designated irrigable lands within such districts. The benefited

landowners thereby assessed for the cost of the facilities are repaying such construction charges, without interest, over a forty year period.

5.4 Corresponding facilities within the Hudspeth District, that is, the canals, drainage ditches and other local irrigation works, have been financed by Flotation in the public market of interest-bearing bonds issued by the Hudspeth District. Taxes are assessed and collected annually from Hudspeth landowners for a sinking fund to retire such bonds.

5.5 In addition, pursuant to a Warren Act contract, the Hudspeth District has been making annual payments to the Government with respect to Project facilities used to store and carry water to the Hudspeth District for use by its farmers. Such annual payments, aggregating more than $500,000.00 have been applied to reduce the construction charges and operation and maintenance charges otherwise levied on Project lands.

5.6 Defendants Contend: That by virtue of the aforesaid financing arrangements, the landowners and water users within El Paso and Elephant Butte Districts, including those whose lands are assessed for construction charges and those whose lands are not so assessed, are entitled to superior water rights over the Hudspeth landowners.

5.7 Plaintiffs Contend: That the respective methods of financing of the facilities has nothing to do with water rights of the farmers; and, in any event, the respective schemes afford no basis for discrimination against the Hudspeth farmers.

VI. Fourth Controversy: Interpretation of Warren Act.

6.1 A fourth controversy exists between Plaintiffs and Defendants with respect to the extent of the contractual authority of the Secretary of the Interior or his delegate, under Section 1 of the Warren Act of February 21, 1911, (36 Stat. 925, 43 U.S.C.A. sec 523)

6.2 Said statute provides as follows:

"Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of Interior, preserving a first right to lands and entrymennunder the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operation under * * * the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made; Provided, however, That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. * * *"

6.3 Defendants Contend: That Section 1 of the Warren Act authorizes the Secretary by contract to subjugate (a) the usufructuary rights to the use of water, appropriative and riparian, of farmers using

water stored or carried under Warren Act contracts to (b) the water rights of Project landowners, including those whose lands are subject, and those whose lands are not subject, to "construction charges." For this construction, Defendants rely upon the statutory phrase "preserving a first right to lands and entrymen under the project."

6.4 Plaintiffs Contend: That under such statute the Secretary is authorized only to contract for the physical impounding, storage and carriage of water and has no power to contract with respect to usufructuary rights to the use of water; that the Secretary may contract to store and carry water only to the extent of the excess capacity of the Project works and must "preserve a firt right" to the utilization of such storage and carrying capacity of irrigation works for irrigation of the Project lands subject to construction charges with respect to the cost of such works; but that the Government owns no proprietary or beneficial rights to the use of water, and the Secretary has no authority by contract to limit or subjugate the usufructuary rights of landowners to the use of water stored or carried under Warren Act contracts; and, indeed, that the statute prescribes that such rights of user be consistent with rights of user with respect to lands under reclamation projects, that is, in accordance with the arid region doctrine of prior appropriation, as enunciated in the proviso to section 8 of the Reclamation Act, to-wit: "Provided, That the right to use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." (Act of June 17, 1902, 32 Stat. 390, 43 U.S.C.A. sec. 372.)

VII. Fifth Controversy: Effect of Contracts.

7.1 A fifth controversy exists between Plaintiffs and Defendants with respect to the legal effectiveness, vel non, to restrict the water rights of the Hudspeth farmers or to divest the rights from the Hudspeth lands, of certain language contained in the Warren Act contracts between the United States Government and the Hudspeth District, a municipal corporation. Said contracts were drafted by officers of the Bureau of Reclamation.

7.2 The Warren Act contract dated December 1, 1924, contains the following language:

"The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal Irrigation Project. In consideration of such rental the District hereby relinquishes all right, title, interest and claim to any and all waters of the Rio Grande except as herein provided."

7.3 The Amendatory Contract dated April 27, 1911, contains the following and almost identical language:

"The rental of water hereunder is secondary and inferior to the right to use of waters on the Rio Grande Federal Irrigation Project for any purposes. The District hereby relinquishes to the United States all right, title, interest and claim to any and all waters of the Rio Grande vested in the District as of December 1, 1924, except as herein provided."

7.4 Defendants Contend: That the legal effect of the above quoted language from the Warren Act con-

tracts between the Government and the Hudspeth District, a municipal corporation, is to subjugate, permanently and forever, (a) the water rights of the Hudspeth farmers, both riparian rights and appropriative rights, including those rights vested prior to December 1, 1924, those vested since that date, and those appropriative which may hereafter be perfected or acquired by the Hudspeth farmers, to (b) the water rights of all owners of all lands within the municipal limits of Elephant Butte and El Paso Districts, including such appropriative water rights as may be hereafter acquired by landowners within those districts, without regard to whether particular lands within the Project Districts are riparian or non-riparian, without regard to whether particular lands within the Project Districts have ever been irrigated, and without regard to whether particular lands within the Project Districts are subject or not subject to construction charges.

75 Defendants Contend: That the effect of the foregoing language is, not merely to justify cutting off the flow of water to the Hudspeth farmers in times of drought, but also to permit the indefinite expansion of the non-riparian irrigated area within Elephant Butte and El Paso Districts, with all prior vested rights of the Hudspeth farmers remaining inferior to the rights appurtenant to such added lands, with the inevitably ultimate result that no water will flow to Hudspeth lands, even in years in which water is plentiful.

7.6 Plaintiffs Contend: That under the Reclamation Laws and the Warren Act, the United States Government owns no proprietary or beneficial rights to the use of water; that the Secretary is authorized only to

contract with respect to the impounding or carriage of water; and that he has no authority or power to provide by contract for restricting or subjugation of the water right of any farmer receiving water through reclamation works; that the Warren Act contracts with the Hudspeth District cannot be given any such effect.

7.7 Plaintiffs Further Contend: That the Hudspeth District, a municipal corporation, although undoubtedly having the power to contract with respect to water rights and other property owned by it in its corporate capacity, had no power and could acquire no power by contract to limit or subordinate the water rights, riparian or appropriative, of the individual farmers owning land within the District Limits, including water rights vested prior to 1924 and those which the farmers might perfect thereafter by beneficial use of water.

7.8 Plaintiffs Further Contend: That the aforesaid Warren Act contracts can be and must be construed so as to make them valid and enforceable, to wit: the "secondary and inferior" phraseology should be construed as a simply negativing any possib argument that the contract might have bthe effect of granting, of itself, any water rights superior to the then vested rights, riparian and appropriative, of Project landowners; or of, in any way, divesting the riparian or appropriative water rights of Project landowners which vested prior to *1924*. Similarly the relinquishment clause can be and must be construed merely as a quitclaim by the Hudspeth District of such water rights as were owned by it in its corporate capacity as of December 1, 1924, and in no way

affecting the water rights owned by the individual farmers.

VIII. Sixth Controversy: Riparian Rights.

8.1 A controversy exists between Plaintiffs and usufructuary rights to the use for irrigation of the waters of the Rio Grande in Texas above Fort Quitman are governed by the riparian doctrine, as opposed to the arid region doctrine of prior appropriation.

8.2 Most of the El Paso and Hudspeth lands lie within surveys which were contiguous to the Rio Grande at the time of the grants from the sovereign and which lie completely within the watershed of the Rio Grande. All owners of such land have correlative and equal rights to the reasonable use for irrigation of that portion of the waters of the Rio Grande which represents the normal flow of the stream.

8.3 For years prior to the first Warren Act contract of December 1, 1924, lands within the present district limits of Hudspeth District were irrigated from the Rio Grande. Indeed, Hudspeth lands were irrigated from the Rio Grande as far back as the 1880s, long before construction of Elephant Butte Dam. And the normal flow of the Rio Grande in the El Paso Valley was theretofore sufficient for Spanish colonists to practice irrigation on the Juarez side more than two hundred years earlier.

8.4 Defendants Contend: That there is no perceptible normal flow of the Rio Grande in Texas above Fort Quitman to which riparian rights can attach, and all the flow of the river may be taken for use on

El Paso lands—including non-riparian El Paso lands—regardless of the need for water on Hudspeth riparian lands.

8.5 Plaintiffs Contend: That the Rio Grande, during years of normal conditions, has a perceptible and calculable normal flow, to which the aforesaid riparian rights of user attach.

IX. Seventh Controversy: Diversions For Power.

9.1 A controversy exists between Plaintiffs and Defendants with respect to the legality, vel non, of certain diversions and consumptive uses of water by the Defendant reclamation officials for generation of hydro-electric power.

9.2 The diversions for power are brought about in this way: Caballo Dam was completed about twenty miles downstream from Elephant Butte Dam in New Mexico in 1938. At the same time a power house and power generation facilities were constructed at Elephant Butte Dam. The practice of the Defendant reclamation officials is to release water from Elephant Butte Reservoir, thereby generating hydro-electric power at Elephant Butte Dam and to catch the waters so released in Caballo Reservoir, whence they are subsequently released for irrigation as needed. But the result of this practice is to spread out, over two reservoirs, the waters which would have otherwise been confined in only one reservoir. The spreading out of impounded waters over the area of two reservoirs causes much greater losses through evaporation and seepage than would result if the water had been impounded in only one reservoir.

9.3 In addition to waters released from Elephant Butte Reservoir, Caballo Dam empounds substantial inflow from arroyos tributary to the Rio Grande between the Elephant Butte Dam and Caballo Dam. Such arroyo inflow waters were formerly available in significant quantities for use on Hudspeth lands as well as on Project lands. Since construction of Caballo Dam, however, these waters have been used in large measure to offset the evaporation and seepage losses above described and have been, in effect, denied to the farmers downstream.

9.4 The increase in the loss of water due to the operation of the power generation facilities in Elephant Butte Dam is a consumptive use of stream flow waters. However, neither the Defendant reclamation officials nor the United States Government has ever taken any step to acquire, in conformity with the laws of New Mexico, any appropriative rights consumptively so to use the waters of the Rio Grande for generation of hydro-electric power; and New Mexico has never recognized any riparian rights to the use of water.

9.5 Neither the laws of New Mexico, Texas or the United States authorize the non-compensatory taking of the usufructuary rights of downstream farmers to the use of water in order to propel Government-owned power generation facilities.

9.6 By Section 5 of the Act of April 16, 1906, (43 U.S.C.A. Sec. 322) the defendant Reclamation Officials are forbidden to make any lease "of such surplus power or power privilege as will impair the efficiency of the irrigation project."

9.7 During the irrigation seasons prior to 1951, the above described use of stream flow water for generation of power in no way interfered with the water rights of any of the farmers above Fort Quitman, because the supply of water was sufficient for all. In 1951 and in years since 1951, however, the aforesaid use of water for power has interfered with and diminished the water supply available for irrigation by the farmers downstream from Caballo Dam and above Fort Quitman, so that all the farmers have had less water than they could beneficially use.

9.8 Defendants Contend: That the Defendant reclamation officials are entitled consumptively so to use the waters of the Rio Grande.

9.9 Plaintiffs Contend: That the above described consumptive uses of water for generation of power is an unlawful invasion of the water rights of the downstream farmers, including the individual Plaintiffs and all members of the class which they represent:

X. Prayer.

Wherefore, Plaintiffs pray as follows:

10.1 That the Court enter a declaratory judgment resolving each of the foregoing controversies in accordance with the contentions of the Plaintiffs, as above stated.

10.2 In the alternative, that the Court enter a declaratory judgment resolving such of the foregoing controversies in such other manner as the Court may deem just.

10.3 That the Court enter a permanent injunction perpetually enjoining and restraining the Defendant reclamation officials, their subordinates, agents and successors from diverting water to or for the named defendants, and to or for the other members of the class which the named defendants represent, in such way as to interfere with the rights of the plaintiffs as herein alleged.

10.4 That the plaintiffs recover their costs (from the defendants other than the United States) and have such other and further legal and equitable relief as the Court may deem just.

Respectfully submitted,

(S.) MORGAN HUNTER,
(Morgan Hunter),

Brown Building,
Austin, Texas.

(S.) TED ANDRESS,
(Theodore Andress),
Attorneys for Plaintiffs.

El Paso National Bank Bldg.,
El Paso, Texas.

ANDRESS, LIPSCOMB, PETICOLAS & FISK, and

El Paso,

POWELL, WIRTZ, RAUHUT & McGINNIS,
Of Counsel.

Austin.

DEFENDANTS' MOTION TO DISMISS.

(Filed November 29, 1955.)

All of the defendants, Robert W. Jennings, W. F. Resch, T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., S. Y. Wilson, El Paso County Water Improvement District No. 1, N. B. Phillips, and the United States of America, move the Court as follows:

I.

To dismiss the action because it appears on the face of plaintiffs' petition that the action is one against the United States, which has not consented to be sued herein, in that it is one in which plaintiffs seek a judgment and relief from the Court going far beyond the terms and provisions of the Act of July 10, 1952, C. 651, Title II, Section 208, 66 Stat. 560 (43 U.S.C.A. Sec. 666), on which plaintiffs rely.

II.

To dismiss the action because the petition fails to state a claim against the defendants upon which relief can be granted.

III.

To dismiss the action because it appears from the face of Plaintiffs' Petition and from facts within the judicial notice of this Court that the Elephant Butte Irrigation District and its constitutent land owners in New Mexico, the owners of water rights appurtenant

to lands in New Mexico under the Reclamation Laws of the United States are indispensable parties to this litigation, have not been served with any process to require their appearance herein, have not appeared herein, and reside beyond the jurisdiction of this Court.

LOUIS A. SCOTT,
Of BURGES, SCOTT, RASBERRY & HULSE,
1100 First National Building,
El Paso, Texas.

EUGENE T. EDWARDS,
Of EDWARDS, BELK, HUNTER & KERR,
Attorneys for Defendant El Paso County Water Improvement District No. 1, and all individual defendants except Jennings and Resch,
11th Floor, Bassett Tower,
El Paso, Texas.

By (S.) LOUIS A. SCOTT,
(S.) EUGENE T. EDWARDS,
RUSSELL B. WINE,
United States Attorney for the Western District of Texas.
Federal Court House,
San Antonio, Texas.

By (S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant United States Attorney for the Western District of Texas.
United States Court House,
El Paso, Texas.

NOTICE OF MOTION.

To: Theodore Andress, Esq., El Paso National Bank Bldg., El Paso, Texas and Morgan Hunter, Esq., Brown Building, Austin, Texas; Attorneys for Plaintiffs.

Please take notice that the undersigned will bring the above motion for hearing before this Court in the Court room of the United States District Court for the Western District of Texas, El Paso Division, in the United States Court House in El Paso, Texas, on the 27th day of January, 1956, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

(S.) LOUIS A. SCOTT,
(Louis A. Scott),
Of BURGES, SCOTT, RASBERRY & HULSE.

1100 First National Building,
El Paso, Texas.

RUSSELL B. WINE,
United States Attorney for the Western District of Texas.

Federal Court House,
San Antonio, Texas.

By (S.) EUGENE T. EDWARDS,
(Eugene T. Edwards),
Of EDWARDS, BELK, HUNTER & KERR,
Attorneys for Defendant El Paso County Water Improvement District No. 1, and all individual defendants except Jennings and Resch.

11th Floor Bassett Tower,
El Paso, Texas.

By (S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant United States Attorney for the Western District of Texas.

United States Court House,
El Paso, Texas.

Proof of Service on Attorneys.

I, Eugene T. Edwards, one of the attorneys of record for defendants in the above cause, certify that on the 29th day of November, 1955, I served the attached and foregoing Defendants' Motion to Dismiss, together with notice of the time set for hearing thereof also attached, upon all attorneys for the plaintiffs, by regisered United States Mail, properly stamped and addressed to said attorneys for plaintiffs as follows:

Theodore Andress, Esq.
El Paso National Bank Bldg.
El Paso, Texas
and
Morgan Hunter, Esq.
Brown Building
Austin, Texas

The addresses of the attorneys for plaintiffs above indicated are their last known addresses and are the addresses furnished by them of record in this cause.

(S.) EUGENE T. EDWARDS,
(Eugene T. Edwards).

DEFENDANTS' ANSWER.

(Subject to their Motion to Dismiss Plaintiffs' Action.)

(Filed December 1, 1955.)

All of the defendants, Robert W. Jennings, W. F. Resch, T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Holt, Tom Holmsley, Paul Harvey, Sr., S. Y. Wilson, El Paso County Water Improvement District No. 1, N. B. Phillips, and the United States of America, come now and answer the plaintiffs' original petition or complaint, as follows:

On Matter of Jurisdiction.

It is shown on the face of plaintiffs' petition and by facts within the judicial notice of this Court that this

is an attempted suit against the United States in an action in which it has not consented to be sued, and is not an action within the terms or provisions or contemplation of the Act of July 10, 1952, 62 Stat. 560, 43 U.S.C.A. Sec. 666, by reason of which this Court should proceed no further herein with the trial of this litigation, and should dismiss the plaintiffs' petition.

Reply to Allegations of Plaintiffs' Petition.

I.

1.1—Defendants admit the allegation of plaintiffs' paragraph 1.1.

1.2—Defendants admit that Ronald Miller, W. F. Hargrove, Jr., J. B. Williams, Kenneth Jones and Lenox W. Moore are individual citizens of the State of Texas, and residents of Hudspeth County, and are land owners in said county, but the defendant deny the remainder of the allegations of said paragraph 1.2.

1.3—Defendants admit the allegations of Paragraph 1.3.

1.4—Defendants admit the allegations of the first two sentences of said paragraph 1.4, except they deny that Paul Harvey, Sr., is an owner or water user on lands above the El Paso County-Hudspeth County line and below Elephant Butte Dam. Defendants deny all of the remainder of the allegations of paragraph 1.4 of said petition.

1.5—In reply to paragraph 1.5, the defendants say that the defendant El Paso County Water Improvement District No. 1 is a political subdividion of the State of Texas rather than a municipal corporation, and that it is duly organized and acts for purposes other than contracting with the United States and its authority is not limited to that purpose, but enjoys all the rights afforded conservation and reclamation districts under the laws and Constitution of the State of Texas.

1.6—In reply to paragraph 1.6 of plaintiffs' petition, defendants deny that the United States of America is a public corporation, and say that it is a sovereign power; they admit the ownership of 400 acres of land with water rights, which land comprises the Federal Detention Farm at La Tuna, Texas, and admit the claim of power rights, subject to the rights of irrigation, admit that the United States is a necessary party to this suit, but deny that by Sec. 208 of the Act of July 10, 1952, on which the plaintiffs rely in said paragraph, that the United States has consented to be joined in a suit such as this.

II.

2.1—Defendants admit the allegations of paragraph 2.1 of the petition.

2.2—Defendants admit the allegations of paragraph 2.2 of the petition, except the allegation that Fort Quitman is established as a "juristic" division point between the Upper Rio Grande and the Lower Rio Grande, and say that in this respect the allegations of said paragraph are ambiguous and confusing, and the defendants request further clarification.

2.3—Defendants admit the allegations of paragraph 2.3 of the petition, on the assumption that by "municipal limits" with reference to district boundaries is meant geographical limits.

2.4—Defendants admit the allegations of paragraph 2.4 of the petition, except the allegation that all of the irrigation works within the Elephant Bute and El Paso Districts are operated by the Bureau of Reclamation, which allegation is not correct in that there are at this time approximately 1500 wells which are operated by private individuals for irrigation purposes and are not operated by the Bureau of Reclamation.

2.5—With reference to paragraph 2.5, defendants admit the correctness of the first sentence thereof if, by "recorded history" is meant stream history as maintained by the Federal Government, otherwise defendants say they are without sufficient information either to admit or deny said allegation, hence deny the same. Defendants deny that the Bureau of Reclamation officials "cut off" the flow of water to the Hudspeth farmers, and say that the true facts are that there was no water left to flow after use on the Project. They deny that agriculture ceased within the Hudspeth District on account of any wrongful action whatsoever taken by officials of the Bureau of Reclamation or any other defendant herein.

2.6—In reply to paragraph 2.6 of the petition, the defendants deny any wrongful or illegal interference with any vested water rights of any plaintiff herein.

III.

3.1—The defendants admit that a controversy exists between the parties.

3.2—Defendants admit that waters have been extensively used in the El Paso County Water Improvement District No. 1, and that El Paso land owners claim valid rights to continued use of such water, and defendants deny all of the remainder of said paragraph 3.2.

3.3—Defendants deny all the allegations of paragraph 3.3 of the petition.

3.4—Defendants deny all the allegations of paragraph 3.4 of the plaintiffs' petition, and say that Sec. 8 of the Reclamation Act of June 17, 1902, 32 Stat. 388, 390, expressly contains the following:

"Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

3.5—Defendants deny that the allegation of paragraph 3.5 of plaintiffs' petition is a correct statement of defendants' contention or position, their contention and position being hereinafter fully set out under "Affirmative Defenses."

3.6—Plaintiffs' contention as set out in paragraph 3.6 of the petition speaks for itself. Defendants say that the purpose of this litigation is to determine its correctness.

3.7—Plaintiffs' contention as set out in paragraph 3.7 of the petition speaks for itself. Defendants say that the purpose of this litigation is to determine its correctness.

IV.

4.01—Defendants admit that they claim the right to use all of the return flow water to the extent that same can be applied beneficially to lands of the Rio Grande Project. All of the remainder of the allegations of paragraph 4.01 defendants deny.

4.02—For the purposes of this suit defendants admit the allegations of paragraph 4.02 of the plaintiffs' petition.

4.03—Defendants admit that they have tried not to use such waters as are mentioned in paragraph 4.03 of the plaintiffs' petition, without dilution of same, but none of the defendants have ever abandoned any water rights relative to drainage, seepage, return flow, or any other water rights; such specific waters as were released in the past from such drainage ditches or otherwise have been, at the moment, surplus to Project needs.

4.04—Defendants deny all the allegations of paragraph 4.04 of plaintiffs' petition.

4.05—The defendants admit all of the allegations of paragraph 4.05 of the plaintiffs' petition except the last sentence thereof, the correctness of which the defendants deny.

4.06—Defendants deny all the allegations of paragraph 4.06 of the plaintiffs' petition.

4.07—Defendants deny all the allegations of paragraph 4.07 of plaintiffs' petition.

4.08—Defendants admit the allegations of paragraph 4.08 of plaintiffs' petition, but say that such arrangement and procedure was pursuant to a contract in writing made the first day of December, 1924, between the United States of America and the Plaintiff Hudspeth County Conservation and Reclamation District No. 1, which contract is still in full force and effect except as modified by subsequent contracts in writing between the same parties.

4.09—Defendants deny all the allegations in paragraph 4.09 of plaintiffs' petition.

4.10—Defendants deny the allegation of paragraph 4.10 of plaintiffs' petition as said paragraph is worded, but do contend that no defendants have ever abandoned any water rights in the Rio Grande or its tributaries or any rights in return flow or seepage water.

4.11—The plaintiffs' contention as set forth in paragraph 4.11 of the petition speaks for itself.

V.

5.1—The defendants deny the allegations of paragraph 5.1 of the plaintiffs' petition, and say that the defendants' rights are claimed under the statutory and common law of the United States, of New Mexico, and of Texas.

5.2—Defendants deny all the allegations of paragraph 5.2 of plaintiffs' petition.

5.3—Defendants admit that the allegations of paragraph 5.3 of plaintiffs' petition are substantially correct.

5.4—Defendants admit the allegations of paragraph 5.4 of plaintiffs petition.

5.5—Defendants say that the allegations of paragraph 5.5 of the plaintiffs' petition are substantially correct.

5.6—Defendants deny the allegations of paragraph 5.6 of plaintiffs' petition, and say that defendants' claims are based not on financing arrangements, but on the statutory and common law of the United States, New Mexico and Texas.

5.7—Defendants say that the allegations of paragraph 5.7 of the plaintiffs' petition, setting forth their contentions, speak for themselves.

VI.

6.1—Defendants admit the allegations of paragraph 6.1 of plaintiffs' petition.

6.2—Defendants admit the allegations of paragraph 6.2 of plaintiffs' petition.

6.3—Defendants say that their contention is not fully, adequately or correctly set forth by plaintiffs in this paragraph, and consequently it is denied. De-

fendants' position is set forth hereinafter under "Affirmative Defenses." Defendants do contend that the land owners of the Rio Grande Federal Reclamation Project in New Mexico and Texas acquired vested rights prior to and superior to those of any of the plaintiffs herein to the use of the waters of the Rio Grande and its tributaries as of initial date January 23, 1906, when the United States, pursuant to the Reclamation Act of June 17, 1902, made a filing in the Territory of New Mexico under New Mexico Territorial Law, and later amended the same by supplemental notice of April ..., 1908, which related back to the original filing, and that the rights thus secured by the exercise of sovereign power by the United States of America became appurtenant to the land irrigated within the Rio Grande Federal Reclamation Project, by reason of Sec. 8 of the Reclamation Act of June 17, 1902, and that under the Warren Act, to which reference is made by plaintiffs, the Secretary of the Interior could not make any contract for delivery of water to any user outside of the Rio Grande Federal Reclamation Project which would prejudice the rights of any land owners within said Rio Grande Project.

6.4—With reference to paragraph 6.4 of the plaintiffs' petition, defendants say that the allegations setting forth their contention speak for themselves.

VII.

7.1—Defendants deny all the allegations of paragraph 7.1 of the plaintiffs' petition.

7.2—Defendants admit the correctness of the allegations of paragraph 7.2 of the plaintiffs' petition.

7.3—Defendants admit the correctness of the allegations of paragraph 7.3 of the plaintiffs' petition.

7.4—Defendants say that their position with reference to the contracts mentioned in paragraph 7.4 of the plaintiffs' petition is incorrectly stated therein. Defendants' position is hereinafter set out under "Affirmative Defenses."

7.5—Defendants say that their position with reference to the contracts mentioned in paragraph 7.5 of the plaintiffs' petition is incorrectly stated therein. Defendants' position is hereinafter set out under "Affirmative Defenses."

7.6—Defendants say that plaintiffs' contentions in paragraph 7.6 of the petition speak for themselves.

7.7—Defendants say that plaintiffs' contentions in paragraph 7.7 of the petition speak for themselves.

7.8—Defendants say that plaintiffs' contentions in paragraph 7.8 of the petition speak for themselves.

VIII.

8.1—Defendants deny the allegations of paragraph 8.1 of plaintiffs' petition.

8.2—Defendants deny the allegations of paragraph 8.2 of plaintiffs' petition.

8.3—In reply to paragraph 8.3 of the plaintiffs' petition, defendants admit that prior to December 1, 1924, there was a relatively small amount of land under irrigation in Hudspeth County, but the defendants deny all the other allegations of said paragraph 8.3 of the petition.

8.4—The defendants admit the allegations of paragraph 8.4 of the petition.

8.5—The defendants say that the plaintiffs' contention as set forth in paragraph 8.5 of the plaintiffs' petition speaks for itself.

IX.

9.1—Defendants admit the allegations of paragraph 9.1 of plaintiffs' petition.

9.2—Defendants admit the allegations of the first sentence of paragraph 9.2 of plaintiffs' petition to the effect that Caballo Dam was completed about twenty miles down stream from Elephant Butte Dam in New Mexico in 1938, but they deny the correctness of the allegation in the second sentence of said paragraph to the effect that at the same time the power house and power generation facilities were constructed at Elephant Butte Dam, and say that the power house and generation facilities were completed in the latter part of the year 1940. Defendants admit the allegations of the third sentence of said paragraph to the effect that it has been the practice of the defendant Reclamation Officials to release water from Elephant Butte Reservoir, thereby generating hydroelectric power at Elephant Butte am, and to catch the water

so released in Caballo Reservoir, from which it is subsequently released for irrigation as needed; however, the defendants deny the correctness of the fourth sentence of said paragraph to the effect that the result of this practice is to spread out over two reservoirs the water which would have otherwise been confined in only one reservoir, and say that this is limited by and applies only to the capacity of Elephant Butte Reservoir. Defendants deny the allegations of the last sentence of said paragraph, wherein it is alleged that the spreading out of impounded waters over the area of two reservoirs causes much greater losses through evaporation and seepage than would result if the water had been impounded in only one reservoir. Defendants' position with reference to the generation of hydroelectric power is further set forth under "Affirmative Defenses."

9.3—Defendants admit that the United States has taken no steps to acquire water rights in New Mexico with reference to the Grande Federal Reclamation Project in addition to those acquired in 1906 and 1908 under the Reclamation Act of June 17, 1902, and the Filings under the Territorial Laws of the then Territory of New Mexico, but deny all of the remainder of the allegations of said paragraph, and state that such losses as occur by evaporation are compensated by increase in conservation.

9.4—Defendants admit the allegations of paragraph 9.4 of plaintiffs' petition.

9.5—Defendants admit the allegations of paragraph 9.5 of plaintiffs' petition, except that its citation to Sec. 5 of the Act of April 16, 1906, as being 43 U.S.C.A., Sec. 322, is incorrect, the correct citation

being Sec. 522, but in any event is wholly irrelevant to this case as there is no lease at issue herein.

9.6—Defendants admit the correctness of the statement in the first sentence of Paragraph 9.6 of plaintiffs' petition, but deny all of the remainder of the allegations set forth therein.

9.7—Defendants say, in reply to paragraph 9.7 of plaintiffs' petition, that the defendant Reclamation Officials do have the right to use water in question for power purposes under the existing facts, circumstances and contracts between the parties, including the contracts between the United States of America and the Hudspeth County Conservation & Reclamation District No. 1 hereinafter mentioned under "Affirmative Defenses."

9.8—The allegation of paragraph 9.8 of plaintiffs' petition, setting forth plaintiffs' contentions, speaks for itself.

X.

The defendants deny each and every allegation in each and every paragraph of the plaintiffs' original petition, except such allegations as are hereinabove expressly admitted.

Affirmative Defenses.

XI.

11.01—Prior to the first water appropriation act by the Texas Legislature in the year 1889, this state ad-

hered to a modified common law doctrine of riparian water rights pursuant to which owners of land abutting on a stream were entitled to take therefrom for domestic and irrigation purposes only their pro rata part of the normal flow, which is that up to the line of highest ordinary flow. Above that line the waters are flood waters to which riparian rights do not attach, but over which the Texas Board of Water Engineers, created for the first time in the year 1913, has the power of disposition under the appropriation laws of this state, subject to the rights of the Rio Grande Federal Reclamation Project.

11.02—In 1889 A. M. Loomis and others secured under the first appropriation act the right to withdraw from the Rio Grande 333 cubic feet of water per second of time for irrigation purposes through what is now called the Franklin Canal, for use on lands now within the exterior boundaries of the defendant El Paso County Water Improvement District No. 1. This appropriation passed through several subsequent owners and finally to the United States for the use and benefit of the Rio Grande Federal Reclamation Project in 1912. Thereafter, on June 10, 1914, the United States certified this appropriation to the Board of Water Engineers of the State of Texas by "Certified Filing No. 123," but without waiving any rights of the United States or its successors in control of any of the works described in said certification. This appropriation by Loomis and others is a valid appropriation, superior to and with priority over any rights of any plaintiff herein to divert waters of the Rio Grande, and the headgate and point of diversion of the Franklin Canal is many miles upstream on the Rio Grande from any lands of any of the

plaintiffs. The Franklin Canal has been used continuously by the United States since 1912 as a part of the facilities of the Rio Grande Project and the storm and flood waters of the Rio Grande reaching the headgate of said canal since 1916 have not exceeded the quantity of such waters which the United States is entitled to divert for use on Project lands.

11.03—The United States as a sovereignty has the power through the Congress under the general welfare clause of the Constitution to promote the general welfare through large scale projects for reclamation, irrigation, or other internal improvement. The Rio Grande Federal Reclamation Project is such a project. It was undertaken and constructed by the Government under the Act of June 17, 1902 (32 Stat. 388), having been authorized by the Act of February 25, 1905 (33 Stat. 814). Elephant Butte Dam and Reservoir and Caballo Dam and Reservoir are integral parts of the Project and their purposes are to fulfill a treaty obligation to the Republic of Mexico (Convention of May 21, 1906, 34 Stat. 2953), and to irrigate something less than 190,000 acres of arid lands in New Mexico and Texas, which can be accomplished only by storage of waters of the Rio Grande. These and other project facilities are owned by the United States which, through the Bureau of Reclamation, operates them.

11.04—The plaintiff Hudspeth County Conservation & Reclamation District No. 1 is not now and never was a part of the Rio Grande Federal Reclamation Project and none of the lands now located within its exterior boundaries were ever a part of or within said Project.

11.05—In conformity with Special Statutes of Territorial New Mexico, in order to provide a water supply for the Rio Grande Project, the United States, by notice dated January 23, 1906, secured the appropriation of 730,000 acre feet of water annually from the Rio Grande by way of direct diversion or storage. Thereafter, by supplemental notice of April ..., 1908, it acquired the enlarged right to "all the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River," with storage to be about nine miles west of Engle, New Mexico, a location now known as Elephant Butte Reservoir, and diversions below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas. Such waters were definitely committed to the prior right of and use by the land owners whose lands composed the Rio Grande Federal Reclamation Project under the terms of the Reclamation Act of June 17, 1902 (32 Stat. 388), particularly Section 8 thereof wherein it is "Provided, That the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right," and also under and pursuant to the statutory and common law of both New Mexico and Texas.

11.06—The original landowners whose lands made the construction feasible have been succeeded by the Elephant Butte Irrigation District, which is now the New Mexico unit of the Project, and in Texas by the El Paso County Water Improvement District No. 1. On June 15, 1918, the United States made a contract with Elephant Butte Irrigation District, modified and supplemened by a later contract between the same

parties dated November 9 1937, whereby the United States set forth the manner and terms for its delivery of water from storage to New Mexico lands which were assessed for repayment of construction costs to the Government, said contract providing for method of payment by said District.

11.07--On January 17, 1920, by written contract bearing that date, under and pursuant to the authority of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplemental thereto, a contract was entered into between the United States of America, acting for such purpose by John Barton Payne, Secretary of the Interior, the El Paso County Water Improvement District No. 1, and the El Paso Valley Water Users' Association, the latter being a private corporation and the predecessor of the defendant District, organized under the laws of the State of Arizona but having its principal place of business in the City of El Paso, Texas, by the terms of which it was, among other things, provided that the El Paso County Water Improvement District No. 1 should assume the liability for reimbursement to the United States of the aggregate sum represented by the cost of the irrigation and drainage works theretofore constructed or thereafter to be constructed for the use and benefit of lands within the District, and agreed to pay the same and each installment thereof, such aggregate sum to include the District's proportionate share of the cost for the construction of the Elephant Butte Reservoir and the total liability assumed by the District for irrigation and drainage construction purposes, exclusive of penalties, to be in no case more than $4,941,000.00. By said contract it was further agreed that as soon

as the affairs of El Paso Valley Water Users' Association should permit, there should be a dissolution of said Association. By a proceeding in rem in the District Court of El Paso County, Texas, 65th Judicial District, numbered 19944 on the docket of that Court, styled Ex Parte El Paso County Water Improvement District No. 1, it was adjudged on April 4, 1921, that the District was and is a legal and valid conservation and reclamation district under the Constitution and laws of Texas, and the above mentioned contract entered into with the United States of America January 17, 1920, was and is a valid contract, binding on the District. Said judgment is a matter of record in Book 4, Page 365, of the Minutes of the 65th District Court of El Paso County, Texas.

11.08—Thereafter, on the 12th day of October, 1922, a contract supplementary to the contract of January 17, 1920, was entered into between the United States of America, acting through E. C. Finney, First Assistant Secretary of the Interior, and El Paso County Water Improvement District No. 1, pursuant to and under authority of the same Act of Congress above mentioned as authority for the execution of the contract of January 17, 1920, by the terms of which it was provided, among other things, that the United States of America would expend, in addition to the amounts covered by the contract of January 17, 1920, the sum of $1,165,000.00, or so much thereof as may be appropriate and necessary in the opinion of the Secretary for additions to existing storage works, and it was provided therein that the District should pay to the United States as a part of the construction cost of the Project, the aggregate cost of all works constructed under the provisions of said supplemen-

tary contract just mentioned, provided that such aggregate cost, exclusive of certain named items, should in no event exceed the sum of $1,165,000.00.

11.09—Under date of November 10 1937, defendant El Paso County Water Improvement District No. 1 entered into a written contract with the United States of America, acting for that purpose through Harold Ickes, Secretary of the Interior, by the terms of which contract, among other things, it was provided that El Paso County Water Improvement District No. 1, for itself and its water users and land owners, and for its successors and their successors and assigns, conveyed and granted to the United States all of its and their claims of right, title, interest and estate in the use of the Elephant Butte Dam and other project works, including the project water supply, for the development of hydro-electric energy by the United States, and in consideration of such grant and transfer, the United States of America relieved said District of 43.2258 per centum of the amount in said contract specified as the equitable amount of the construction cost chargeable to power development, being the sum of $1,835,544.00, and agreed to reduce and did reduce the obligations of the District for the payment of its share of the construction cost of the Rio Grande Federal Reclamation Project (United States and Mexico) from $6,106,000.00 which the District had assumed and had agreed to pay to the United States under its original contract as amended and supplemented, to $4,270,456.00. Said contract further provided that the El Paso County Water Improvement District No. 1 should receive credit for water rental collections from Hudspeth County Conservation and Reclamation District, and said con-

tract further provided that the amounts due the United States should be a first charge upon the collections of El Paso County Water Improvement District No. 1, which agreed that it would cause to be levied and collected all necessary assessments, including a sum to cover (1) any individual collection delinquency for past years, and (2) estimated individual collection delinquency for the year for which assessments are being levied, and should use all powers and resources of the District, including the taxing power of the District, and the power to withhold delivery of water, to collect and pay to the United States all charges provided for in said contract, in full, on or before the day that same should become due. Thereafter, on November 8, 1939, in proceeding in rem, numbered 46742 on the docket of the District Court of El Paso County, Texas, 41st Judicial District, styled Ex Parte: El Paso County Water Improvement District No. 1, it was adjudged that said El Paso County Water Improvement District No. 1 is a legal and valid conservation and reclamation district under the Constitution and the laws of the State of Texas relating thereto, and said contract entered into by and between the United States of America, acting for said purpose by Harold Ickes, Secretary of the Interior, under the provisions of the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplemental thereto, and the El Paso County Water Improvement District No. 1, a public corporation, which contract is dated the 10th day of November, A. D. 1937, was and is in all respects a valid contract, binding upon said El Paso County Water Improvement District No. 1.

11.10—Defendant El Paso County Water Improvement District No. 1 has at all times since been operating under and pursuant to the above described contracts between it and the United States, to which none of the plaintiffs were parties; and none of plaintiffs ever having been any part of the Rio Grande Project.

11.11—Construction on Elephant Butte Dam was commenced in 1911 and completed in 1916. Contracts had been made by the United States with land owners within the Project as early as 1906 for repayment of construction costs, and at that time and at the time of completion of Elephant Butte Dam, irrigation within the area now occupied by the plaintiff Hudspeth County Conservation & Reclamation District No. 1 was practically non-existent. Said Hudspeth District was not organized or created until August 6, 1923.

11.12—On or about December 1, 1924, the plaintiff Hudspeth County Conservation & Reclamation District No: 1, in behalf of its constituent land owners, made a written contract bearing that date with the United States of America providing for the delivery of water, under stated conditions, by the United States to the District at the terminus of the Tornillo Main Canal located at the southern end of the Rio Grande Project, upon terms set out in said contract, wherein paragraph 6 provided:

"6. The United States will deliver to the District at the terminus of the Tornillo Main Canal, during the irrigation season of 1925 and thereafter during each irrigation season as established on the Rio Grande Project, such water from the project as may be avail-

able at said terminus without the use of storage from Elephant Butte reservoir. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. The rental of water hereunder is secondary and inferior to the right to use water for any purpose on the lands of the Rio Grande Federal irrigation project. In consideration of such rental the District hereby relinquishes all right, title, interest and claim to any and all waters of the Rio Grande, except as herein provided."

This contract was re-affirmed almost annually between 1931 and 1951 by eighteen successive supplemental agreements in writing between the same parties, in each of which it was expressly stated that the contract of December 1, 1924, except as modified by subsequent agreements, should remain in full force and effect.

11.13—On or about April 27, 1951, the contract between the United States of America and plaintiff Hudspeth County Conservation & Reclamation District No. 1, above mentioned, was amended in writing in certain respects by another written agreement bearing that date between the same parties, in which paragraph 6 of the original contract of December 1, 1924, was amended by paragraph 8 of the 1951 contract to read as follows:

"8. Article 6 of said contract of 1924 shall be and the same amended to read as follows:

"'Rental of Water to District.

"'6. The United States has delivered to the district during the irrigation season of 1950, and will de-

liver thereafter during each irrigation season, such water as may be available through the following distribution facilities or others which may be constructed and useful in the future: The Tornillo Canal; The Fabens Waste Channel; The Outlet of the Tornillo Drain. So far as it may do so without additional prouect expense to the United States, it will endeavor to make waters available hereunder, to the end that the district may fully utilize such waters for the irrigation of its lands. The availability, the choice of distribution facilities, and the points of availability will be dependent upon operating conditions on the project, without the use of project storage. The Secretary of the Interior shall be at all times the sole judge of the availability of such water. *The rental of water hereunder is secondary and inferior to the right to use of waters on the Rio Grande Federal Irrigation project for any purpose. The district hereby relinquishes to the United States all right, title, interest and claim to any and all waters of the Rio Grande vested in the District as of December 1, 1924, except as herein provided.*'" (Emphasis added.)

The language of this amendment was supplied by the Hudspeth District through its attorney.

To cover further cases of insufficiency of water which might arise in the future, the parties amended paragraph 13 of the 1924 contract to read:

"13. On account of drouth, inaccuracy in distribution, or by reason of the requirements and use within the Rio Grande Irrigation Project or by reason of use of project water transferred from Project water right lands, for municipal purposes or other causes,

there may be at times an insufficiency of water for district lands but in no event shall any liability accrue against the United States or any of its officers, agents, or employees, for any damage direct or indirect arising therefrom, nor shall any charge provided for herein be reduced on account of such shortage except as provided in Article 7 hereof."

The 1924 contract was also amended by adding to it an article number 18, which is included in paragraph 15 of the contract of April 27, 1951:

"18. In the event of disputes between the parties hereto arising out of this contract involving questions of fact, and insofar as the provisions hereof require a determination of fact to be made, the Secretary is hereby designated as the arbiter of such questions, and as the one required to make such determination of facts; and his decision thereon shall be conclusive and binding upon the parties hereto."

On March 21, 1951, Mr. J. T. McKinney for the District submitted the matter to the Honorable Oscar L. Chapman, Secretary of the Interior, inviting attention to Article 6 of the contract of December 1, 1924, providing that the "Secretary of the Interior shall be at all times the sole judge of the availability of such water." On April 18, 1951, the Secretary decided against the District.

11.14—On March 18, 1938, the States of Colorado, New Mexico and Texas signed the Rio Grande Compact which was ratified and confirmed by the State of Texas by Acts of 1939 46th Legislature, Special Laws, page 531, Vernon's Civil Statutes of Texas.

Annotated, Article 7466e-1, (ratified by New Mexico, Laws of 1939, Chap. 33, page 59, ratified by the State of Colorado, Laws of 1939, Chap. 146), and approved by the Congress of the United States, Public Law No. 96, May 31, 1939, Chap. 155, 53 Stat. 785. This Compact, wherein all three states acted parens patriae in behalf of all of their citizens and water users, provided for the distribution of waters of the Rio Grande and its tributaries among the several states and committed those waters which Texas was entitled to receive to the primary right and superior service of all of those lands within the exterior boundaries of the Texas unit of the Rio Grande Federal Reclamation Project.

11.15—The laws of Texas are subordinated to the Federal Reclamation Laws.

The Texas Board of Water Engineers has no jurisdiction over, or power to dispose of, any of the waters of the Rio Grande secured by the Federal Government for the Rio Grande Project under the filings of 1906 and 1908 and brought into Texas after that appropriation for use of that portion of the Project in Texas so long as that water is retained within the control of the operators of that Project.

Prior to 1889 the riparian doctrine of water rights, as modified by judicial interpretation of the appellate Courts of Texas, existed in this State. In that year the Legislature passed the Irrigation Act of March 19, 1889 (General Laws of Texas, 21st Legislature, Regular Session, Ch. 88, pp. 100-103).

Section 1 of that Act provided that the "unappropriated waters of every natural stream within the arid portion of the State of Texas . ." may be diverted from its natural channel for irrigation and other uses, subject to domestic uses of riparian owners.

Section 2 declared such unappropriated waters to be the property of the public and provided for its acquisition by appropriation but the Act nowhere defined "unappropriated waters."

Under this Act, A. M. Loomis and others filed with the County Clerk of El Paso County, Texas, an appropriation for the "El Paso Irrigation Canal," now called the Franklin Canal, on July 6, 1889, and later, on August 10, 1889, filed with the County Clerk an amended appropriation dated July 29, 1889, for the canal carrying 333 cubic feet of water per second of time, which appropriation as hereinabove mentioned is now owned by the United States for the benefit of the Rio Grande Project land owners.

"Unappropriated water" was not defined until the provisions of the Texas Irrigation Act of 1895, 24th Regular Legislature, Chap. 21, pp. 21-26, divided the waters of the rivers of the state into two classes, first the unappropriated waters of the ordinary flow or under flow of every natural stream, and, second, the storm or rain waters of every natural stream within the arid portions of the State.

The Texas Irrigation Act of 1913, 33rd Regular Legislature, Chap. 171, pp. 358-379, retained sub-

stantially the same definition of waters subject to appropriation and for the first time created a Board of Water Engineers with authority to issue permits for appropriation of public waters and saving vested rights existing when the act went into effect June 30, 1913.

In 1931 the Forty-Second Legislature of the State of Texas, at its Regular Session, 42nd Regular Legislature, Chap. 128, pp. 217-219, passed an act declaring the policy of the State to the use of public waters, exempting any stream which constitutes the international boundary between the United States and the Republic of Mexico from the operation of the act and declaring an emergency. Since the effective date of that act, aside from any question of Federal Irrigation Projects, the waters of the Rio Grande are not subject to appropriation under permits issued by the Texas Board of Water Engineers without Federal approval.

By the Convention of February 1, 1933, between the United States and Mexico (42 Stat. 1621), for the rectification of the Rio Grande, it was provided for decreasing the length of the river between Monument 15 (at El Paso) to Box Canyon (at Ft. Quitman below the Hudspeth lands) from 155 miles to 88 miles and confining this channel between two parallel levees.

Article VII of that Convention is as follows:

"Lands within the rectified channel, as well as those which, upon segregation, pass from the territory of one country to that of the other, shall be *acquired in full ownreship by the Government* in

whose territory said lands are at the present time; and the lands passing as provided in Article V hereof, from one country to the other, shall pass to each Government respectively in *absolute sovereignty and ownership*, and without encumbrance of any kind and *without private national titles.*" (48 Stat. 1624-1625). (Emphasis supplied.)

The undertaking of this convention has since been known as the River Rectification Project.

Later the Rio Grande Canalization Project, Act of August 29, 1935, 49 Stat. 961, provided for a diversion dam across the channel of the river at El Paso, Texas, where it is entirely on American soil, and further provided for the canalization of the Rio Grande from Caballo Reservoir in New Mexico to El Paso.

By Act of the Texas Legislature, September 22, 1934, General and Special Laws, 43rd Legislature, 3rd Called Session, Chap. 15, p. 29, the State ceded to the United States all of its right, title and interest in and to the bed and banks of the Rio Grande in El Paso County and in Hudspeth County which may be necessary or expedient in the construction of the project for the rectification of the channel of the Rio Grande under the Treaty of February 1, 1933, between the United States and Mexico.

Thus, by Acts of Congress and the Texas Legislature, the Rio Grande, in effect for all practical purposes, is a federal canal from Caballo Dam in New Mexico, the point of release of water by the Bureau of Reclamation for the Rio Grande Federal Reclama-

tion Project, to Fort Quitman, Texas, which is on the river below all of the lands of plaintiffs in this suit, and is not a "natural Stream" within the meaning of that term as used in the Acts of the Texas Legislature.

11.16—Defendants plead all of the two-year, all of the four-year and all of the ten-year statutes of limitations of the State of Texas as set forth in Revised Civil Statutes of Texas, in bar of all of the plaintiffs' allegations and demands herein, and say, with respect thereto, that the plaintiffs' cause of action, if any, accrued more than two years and more than four years and more than ten years next preceding the filing of their petition herein, and say that the possession, use, custom, practice and procedure of defendants in the operation of the facilities of the Rio Grande Federal Reclamation Project and the control and disposition of the waters of the Rio Grande for the benefit of only landowners within and part of the Project were sufficiently open, notorious, claimed as a right, and adverse to any and all claims now asserted by the plaintiffs herein to initiate the operation of said statutes of limitations, and cause all of them to run against all of such claims and demands.

11.17—For a period of approximately 31 years, and at all times since the execution of the contract of December 1, 1924. between the United States of America and the Hudspeth Conservation and Reclamation District No. 1, as amended by the contract of April 27, 1951, all of the plaintiffs herein, and the land owners within the Hudspeth County Conservation and Reclamation District No. 1, in whose behalf

this suit is brought, have accepted benefits under said contract as amended and have recognized such contract as having been made for the benefit of all of the constituents and land owners comprising said District, and have, almost yearly for more than 31 years next preceding the filing of this suit ratified, in writing, said contract, and have recognized the terms thereof to impose on the United States with reference to the quantity of water to be delivered, the obligation to deliver only such water from the Rio Grande Project as was available for that purpose in the judgment of the Secretary of the Interior, without the use of storage from Elephant Butte Reservoir, and have paid the amounts of money required by said contract to be paid, by reason of all of which the plaintiffs are estopped to deny the validity of said contract as so construed and its binding effect on all of the plaintiffs herein with respect to all matters at issue between the parties of this suit.

11.18—Paragraph 6 of the contract of December 1, 1924, and Paragraph 6 of said contract as amended by Paragraph 8 of the contract of April 27, 1951, provides that "the Secretary of the Interior shall be at all times the sole judge of the availability of such water."

When plaintiffs became dissatisfied with the amount of water they were receiving during the 1951 irrigation season, they recognized the binding effect of the language of the contract as set out above, and appealed to the Secretary of the Interior for a determination of the question of availability of water, and the Secretary, in compliance with said appeal, determined that no water was available for delivery

to the plaintiffs other than what they had received and were receiving, and said decision of the Secretary of the Interior is final and binding on the plaintiffs in this case.

11.19—Under the Warren Act (43 U.S.C., Sec. 523), pursuant to which the contracts were made, the Secretary of the Interior had and has authority to contract for the delivery to persons outside of the Reclamation Project only such water as may be in excess of the requirements of the lands to be irrigated under the Rio Grande Project, preserving a first right to the lands under the project. No assurance was contemplated by the language of said contract, nor authorized by said statute that a firm supply of water would be continuously available for any particular year or irrigation season, and the fact that the United States was able, for a period of more than twenty-five years, continuously, to deliver to plaintiffs excess water in quantities adequate for their needs and satisfactory to them, in no way created any obligation on the part of the United States to deliver to plaintiffs the same or substantially the same quantity of water during a year of short supply, such as the year 1951.

11.20—By the end of the year 1950, it was a matter of common knowledge through the Rio Grande Project and throughout the Hudspeth County Conservation and Reclamation District No. 1, and was publicly announced in newspapers of general circulation, and on radio stations serving the area, that the year 1951 would be one of extremely short water supply, and would probably reach a record low since Elephant Butte Dam was completed in 1916, and if the

plaintiffs or any land owners for whom this suit is brought undertook to cultivate the same or substantially the same number of acres as were planted in crops in the year 1950 and prior thereto, they acted at their own peril and assumed the risk of any loss occasioned by failure to receive water in the same or substantially the same amounts as received in previous years.

The conditions forecast, as above set out, did in fact occur. At the beginning of the 1951 irrigation season the quantity of water in Project storage was the lowest in the history of the Project, and that amount steadily decreased during the year because the inflow above Elephant Butte Reservoir was far below average for the previous thirty-four years, and was less than the amount necessary for Project requirements.

For the first year in Project history, the water right lands therein were placed on an allotment basis for the entire season, and received only approximately 50% of the amount of storage water normally placed of beneficial use within the project.

Damages approaching catastrophic proportions were averted only by the sinking of approximately 900 wells, at an enormous total cost, on lands previously served adequately by stored water.

XII.

By reason of all of the matters, facts, laws, contracts and things to which reference is above made as components of paragraphs 11.01 to 11.20 of Para-

graph XI, above, as defendants' "Affirmative Defenses," such rights as plaintiffs may have in the waters of the Rio Grande, including return flow, drainage and seepage from the Rio Grande Federal Reclamation Project are inferior and subordinate to the primary, superior and paramount rights of all of the defendants herein.

XIII.

13.1—In addition to its other provisions, the Convention of February 1, 1933, between the United States and Mexico (48 Stat. 1621) further provided for the construction of a flood retention dam, twenty-two miles below Elephant Butte on the Rio Grande, which is now called Caballo Dam and is the same dam mentioned by that name in plaintiffs' pleadings. Such dam retains flood waters entering the Rio Grande below Elephant Butte Dam and above Caballo Dam in New Mexico and in addition to Elephant Butte would have resulted in two reservoirs instead of one even if the matter of generation of electric power had never been raised. However, penstock openings had been built into Elephant Butte Dam during its construction between 1911 and 1916, and under Congressional Act of April 16, 1906, c. 1631, Sec. 5, 34 Stat. 117, and February 24, 1911 c. 155, 36 Stat. 930, the land owners of the Rio Grande Project in New Mexico and Texas acquired power rights in said Elephant Butte Dam and reservoir and following initiation of the idea of constructing Caballo Dam and reservoir for flood control purposes said land owners themselves brought about its modification to include the generation of hydro-electric power at Elephant Butte, with an interdepartmental agreement between the State Depart-

ment and the Department of the Interior that storage space for 100,000 acre fee of water would be reserved in Caballo Reservoir for flood control purposes.

13.2—During the years 1951, 1952, 1953, 1954 and 1955 if no water at all had been lost through evaporation from the surface of Caballo Reservoir it would not have enured to the benefit of plaintiffs for the reason that it would have been used within the Rio Grande Federal Reclamation Project under its prior water rights vested in it.

13.3—As presently physically constructed the addition of Caballo Reservoir to the use of the Rio Grande Project has contributed to and increased the operating efficiency of the Project as a whole, a circumstance which has enured to the benefit of plaintiffs rather than to their detriment.

13.4—As authorized by the Congress, the land owners of both the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas, by their respective contracts of November 9, 1937, and November 10, 1937, transferred their hydro-electric power rights in Elephant Butte Dam to the United States of America which since said time has been operating such a power producing plant at Elephant Butte Dam under authority of said Act of Congress, which is the Bureau of Reclamation part of the Interior Department Appropriation Act of August 9, 1937 (for the fiscal year 1938) 50 Stat. 564, 593.

Wherefore, defendants pray that plaintiffs' petition or complaint be dismissed, and in the alternative

pray that the plaintiffs take nothing by their suit; that the relief sought by them be denied; that defendants have general relief, and recover herein all costs in this behalf expended.

LOUIS A. SCOTT,
Of BURGES, SCOTT, RASBERRY & HULSE,
1100 First National Building,
El Paso, Texas.

EUGENE T. EDWARDS,
Of EDWARDS, BELK, HUNTED & KERR,
Attorneys for Defendant El Paso County Water Improvement District No. 1 and all individual defendants except Jennings and Resch,
11th Floor, Bassett Tower,
El Paso, Texas.

By (S.) LOUIS A. SCOTT.
(S.) EUGENE T. EDWARDS.

RUSSELL B. WINE,
United States Attorney for Western District of Texas.
Federal Court House,
San Antonio, Texas.

By (S.) HOLVEY WILLIAMS.
(Holvey Williams),
Assistant United States Attorney for the Western District of Texas.
United States Court House,
El Paso, Texas.

I, Eugene T. Edwards, one of the attorneys of record for defendants in the above cause, certify that on the 1st day of December, 1955, I served the foregoing Defendants' Answer upon the attorneys of record for the plaintiffs by mailing a copy thereof to each of them by United States mail, properly stamped and addressed to said attorneys for Plaintiffs as follows:

Theodore Andress, Esq.
El Paso National Bank Bldg.
El Paso, Texas
Morgan Hunter, Esq.
Brown Building
Austin, Texas

The above addresses of the attorneys for the Plaintiffs above indicated are their last known addresses, being the ones furnished by them of record in this cause.

(S.) EUGENE T. EDWARDS,
(Eugene T. Edwards).

DEFENDANTS' SUPPLEMENTAL MOTION TO DISMISS.

(Filed December 6, 1955.)

Come now the United States of America; Robert W. Jennings, Regional Director of the Bureau of Reclamation; and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation; acting by and through J. Lee Rankin, Assistant Attorney General; Russell B. Wine, United States Attorney;

and William H. Veeder, Attorney, Department of Justice, appearing specially for the purpose of this motion only and respectfully

Move This Court to dismiss this case on the following grounds and for the following reasons:

1. This Honorable Court lacks jurisdiction over the United States of America which has neither consented to be sued nor in any manner waived its sovereign immunity from suits of the character here involved under the facts and circumstances alleged in the complaint originally filed in the District Court of Hudspeth County, Texas, 34th Judicial District, No. 1188, and removed to this Court;

2. This Honorable Court does not have jurisdiction as the complaint affirmatively discloses that the plaintiffs seek to substitute the will of this Honorable Court for that of the Secretary of the Interior charged with the responsibility for the administration of the properties involved in the proceeding;

3. This Honorable Court does not have jurisdiction by reason of the fact that the relief which is sought involves the Elephant Butte Dam and Reservoir, Caballo Dam and Reservoir, appurtenant structures for the generation of electrical power, and irrigation, diversion and distribution works, located in the State of New Mexico;

4. This Honorable Court does not have jurisdiction because the complaint fails to state a claim upon which relief can be granted against either the United States of America or the officials of the United States of America who are likewise named defendants;

5. This Honorable Court does not have jurisdiction to entertain the cause against Robert W. Jennings, Regional Director of the Bureau of Reclamation, and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation, by reason of the fact that it is affirmatively disclosed that they are subordinate officials of the Bureau of Reclamation whose powers are derived wholly and entirely from the Secretary of the Interior who is an indispensable party to the proceeding against them; who has not been and cannot be joined in this proceeding;

6. This Honorable Court does not have jurisdiction to entertain the proceeding against Robert W. Jennings, Regional Director of the Bureau of Reclamation, and W. F. Resch, Project Manager of the Rio Grande Project, Bureau of Reclamation, by reason of the decision of the United States Court of Appeals for the Fifth Circuit rendered in the case of Hudspeth County Conservation and Reclamation District No. 1 v. Robbins, Regional Director of the Bureau of Reclamation, et al., 213 F. 2d 425 (C.A. 5, 1954); cert. denied, 348 U. S. 833 (1954);

7. This Honorable Court does not have jurisdiction in regard to the injunctive phases of the proceeding by reason of the fact that the plaintiffs have a plain, speedy and adequate remedy at law; that the plaintiffs fail to allege that they have been sustaining or will sustain irreparable damage by reason of the acts either of the United States of America or of the defendants, subordinate officials of the Bureau of Reclamation.

Wherefore, the United States of America and Robert W. Jennings, Regional Director of the Bureau of Reclamation; W. F. Resch, Project Manager of the

Rio Grande Project, Bureau of Reclamation, move this Honorable Court to dismiss this cause for the reasons and on the grounds discussed above, all of which is supported by the accompanying memorandum of points and authorities.

(S.) J. LEE RANKIN,
(J. Lee Rankin),
Assistant Attorney General,

.....,
(Russell B. Wine),
United States Attorney,

(S.) WILLIAM H. VEEDER,
(William H. Veeder),
Attorney, Department of Justice.

SYNOPSIS TO MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

In the case of Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, Regional Director of the Bureau of Reclamation, et al., the United States Court of Appeals for the Fifth Circuit analyzed the case then before it as follows:

"Plaintiffs sought a declaratory judgment to establish certain water rights of the Hudspeth land owners, and in order to protect such water rights, they sought an injunction against the officials of the Federal Bureau of Reclamation named as defendants, their successors in office, agents and employees."*

* Hudspeth County Conservation & Reclamation Dist. No. 1 v. Robbins, Regional Director of the Bureau of Reclamation, et al., 213 F.2d 425, 426; cert. denied 348 U.S. 833 (1954).

That succinct statement in substance reflects the issues of this case. Similarly, in this case, as in that case, plaintiffs seek relief involving an extensive reach of the Rio Grande in the State of New Mexico. Likewise they seek to control the operation of Elephant Butte Dam and Reservoir, Caballo Dam and Reservoir, power plants, and irrigation facilities, which are also located in the State of New Mexico.

Under the following headings there are respectfully submitted the principles of law which disclose that this Honorable Court is without jurisdiction to entertain the proceeding.

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS.

Preliminary Statement.

"Whatever may be the merits of the plaintiffs' contentions, the Court would have no jurisdiction by declaratory judgment, see Lynn v. United States, 5 Cir., 110 F.2d 586, 588, or by injunction against Government officers to substitute itself in any part of the management and operation of the dams, reservoirs

and facilities for the agency designated by Congress. In a case involving this same project, the Tenth Circuit arrived at the conclusion that the action was in essence a suit against the United States to which it had not consented and that it, therefore, must fail. State of New Mexico v. Backer, 10 Cir., 199 F.2d 426. We entertain the same opinion here. It results that the summary judgment on the merits for the defendants must be reversed and the cause remanded with directions to dismiss the complaint for want of jurisdiction."[1]

"Plaintiffs' contentions" alluded to in the quoted excerpt are "plaintiffs' contentions" in the subject case.

Similarly:

(a) The cause alluded to in the preceding quotation was initiated by the Hudspeth County Conservation and Reclamation District No. 1, et al.;

(b) The cause in question was initiated in The District Court of Hudspeth County, Texas 34th Judicial District;

(c) Certain of the named defendants were subordinate officials of the Bureau of Reclamation;

(d) The cause was removed to this Honorable Court.

A summary judgment on the merits after removal was entered by this Honorable Court in favor of the

[1] Hudspeth County Conservation & Reclamation Dist. No. 1 et al. v. Robbins, et al., 213 F.2d 425, 432 (C.A.5, 1954); cert. denied 348 U. S. 833 (1954).

defendant subordinate officials of the Bureau of Reclamation and the other defendants. Plaintiffs here appealed that summary judgment on the merits and that removed case was

"reversed and the cause remanded. [to this Honorable Court] with directions to dismiss the complaint for want of jurisdiction."

Question Presented.

Does the attempted joinder of the United States of America as a party defendant confer upon this Court jurisdiction in the present case which it did not have over the cause which was dismissed?

In the paragraphs which succeed, under appropriate headings, that salient question will be reviewed.

The United States of America "cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."[2]

Texas, its highest Court has declared:

"* * * can not be sued in her own Courts without her own consent and then only in the manner indicated by that consent."[3]

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[2] Belknap v. Schild, 161 U. S. 10, 16 (1895).

[3] Texas Mexican Railway Company v. Jarvis, 80 Tex. 456, 457; 15 S. W. 1089 (1891).

On the subject it has likewise been authoritatively declared that:

"It is an established principle of jurisprudence in all civilized nations, resting upon grounds of public policy, that the sovereign cannot be sued in its own Courts or in any other Court without its consent and permission."[4]

Repeatedly the Supreme Court of the United States and the highest Courts of the several States have reiterated and reaffirmed the principles enunciated above.[5] Those precepts of the law as they relate here may be declared in summary as follows:

1. "The United States, * * * like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued."[6]

2. "'The exemption from direct suit [against the United States of America] is, * * * without exception.'"[7]

3. "'* * * whoever institutes such proceedings [against the sovereign] must bring his case within the authority of some act of Congress.'"[8]

4. "It is not our [the Court's] right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress."[9]

[4] 49 Am. Jur., States, Territories and Dependencies, Sec. 91.

[5] Suits Against Government Officers and The Sovereign Immunity Doctrine, 59 Har. L. R. 560.

[6] Belknap v. Schild, 161 U. S. 10, 16 (1895).

[7] Ibid., 161 U. S. 10, 16 (1895).

[8] Ibid., 161 U. S. 10, 16 (1895).

[9] United States v. Shaw, 309 U. S. 495, 502 (1939).

5. "Since Larson v. Domestic & Foreign Corp. * * * [337 U.S. 682] a very strict test [respecting the sovereign immunity from suit] must be applied when the suit is one not for damage but for specific relief, such as injunction either directing or restraining the defendant officers' actions * * *."[10]

These criteria, it is respectfully submitted, when applied to the subject case will reveal that the United States of America has not waived its sovereign immunity from suits of the character here involved.

There Has Been No Waiver by the United States of America of Its Sovereign Immunity From Suit in Actions for Declaratory Judgments.

The sole relief sought against the United States of America is for a declaratory judgment. That phase of the cause pertaining to injunctive relief is against the subordinate officials of the Bureau of Reclamation. From the face of the complaint in this cause it will be observed that the allegations present, and the prayer seeks relief in connection with several controversies which allegedly exist. Reference in that regards is made to the several primary averments in that document. The declaratory judgment feature of the cause presents these alleged issues:

[1] "3.1 A controversy exists between Plaintiffs and Defendants with respect to the source, nature, and effective date of the State authorization for acquisition of appropriative water rights to the use of

[10] Hudspeth County Conservation & Reclamation Dis. No. 1 et al. v. Robbins, et al., 213 F 2d 425, 432 (C.A. 5, 1954).

the waters of the Rio Grande for irrigation in Texas above Fort Quitman."[11]

[2] "4.01 A second controversy exists between Plaintiffs and Defendants with respect to the legal effectiveness, vel non, of claimed appropriations for beneficial use on El Paso lands of seepage waters accumulating in certain drainage ditches within the lower portion of El Paso District and designated as the Mesa Drain, the Island Drain, the Tornillo Drain, together with their respective tributary drainage ditches."[12]

[3] "5.1 A third controversy exists between Plaintiffs and Defendants with respect to whether water rights depend upon the nature of the respective water users' schemes for financing costs of irrigation works."[13]

[4] "6.1 A fourth controversy exists between Plaintiffs and Defendants with respect to the extent of the contractual authority of the Secretary of the Interior or his delegate, under Section 1 of the Warren Act of February 21, 1911, (36 Stat. 925, 43 U.S.C.A. sec. 523)." [14]

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[11] Plaintiffs' Original Petition, III, First Controversy: State Authorization, Paragraph 3.1.

[12] Plaintiffs' Original Petition, IV. Second Controversy: Drainage Water, Paragraph 4.01.

[13] Plaintiffs' Original Petition, V. Third Controversy: Financing of Irrigation Works, paragraph 5.1.

[14] Plaintiffs' Original Petition, VI. Fourth Controversy: Interpretation of Warren Act, paragraph 6.1.

[5] "7.1 A fifth controversy exists between Plaintiffs and Defendants with respect to the legal effectiveness, vel non, to restrict the water rights of the Hudspeth farmers or to divest the rights from the Hudspeth lands, of certain language contained in the Warren Act contracts between the United States Government and the Hudspeth District, a municipal Corporation. Said contracts were drafted by officers of the Bureau of Reclamation."[15]

[6] "8.1 A controversy exists between Plaintiffs and Defendants with respect to the extent to which usufructuary rights to the use for irrigation of the waters of the Rio Grande in Texas above Fort Quitman are governed by the riparian doctrine, as opposed to the arid region doctrine of prior appropriation."[16]

[7] "9.1 A controversy exists between Plaintiffs and Defendants with respect to the legality, vel non, of certain diversions and consumptive uses of water by the Defendant reclamation officials for generation of hydro-electric power."[17]

Reference is here made to the sentence contained in the complaint which immediately precedes the allegations in connection with the several controversies set forth above:

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[15] Plaintiffs' Original Petition, VII. Fifth Controversy: Effect of Contracts, Paragraph 7.1.

[16] Plaintiffs' Original Petition, VIII. Sixth Controversy: Riparian Rights, Paragraph 8.1.

[17] Plaintiffs' Original Petition, IX. Seventh Controversy: Diversions for Power, Paragraph 9.1.

"Plaintiffs bring this action for a *declaratory judgment*, adjudicating the rights of the Plaintiffs in respect of the controversies hereinafter set forth, and for an injunction restraining continued interference with Plaintiff's vested water rights by Defendant reclamation officials."[18] (Emphasis supplied.)

Any doubt that this proceeding is in truth and in fact an action against the National Government for a declaratory judgment, should any remain, is removed by those averments contained in the prayer for relief:

"10.1 That the Court enter a declaratory judgment resolving each of the foregoing controversies in accordance with the contentions of the Plaintiffs, as above stated.

"10.2 In the alternative, that the Court enter a declaratory judgment resolving such of the foregoing controversies in such other manner as the Court may deem just."[19]

Manifest from those quoted allegations in the complaint here involved is this fact:

They are drafted in contemplation of this Congressional enactment:

"In a case of actual controversy within its jurisdiction, * * * any Court of the United States, upon the filing of an appropriate pleading, may declare the

[18] Plaintiffs' Original Petition, II, Introductory, Paragraph 2.6.

[19] Plaintiffs' Original Petition, X. Prayer, Paragraphs 10.1 and 10.2.

rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. * * *"[20]

Pertinent, therefore, is this question: Has the United States of America waived its sovereign immunity from suit in actions for declaratory judgments? Perforce the response to the inquiry is in the negative. Unequivocally the Court of Appeals for the Fifth Circuit has thus declared in the earlier case presenting the issues here under consideration.[21] In defining the relief sought the Court in the decision last cited, stated: "Plaintiffs sought a declaratory judgment to establish certain water rights of the Hudspeth land owners, and in order to protect such water rights, they sought an injunction against the officials of the Federal Bureau of Reclamation named as defendants * * *."[22] That succinct statement aptly describes this cause.

After a comprehensive review of the law on the jurisdiction of this Honorable Court to entertain a proceeding of this character, the Court of Appeals ruled:

"Whatever may be the merits of the plaintiffs' contentions, the Court would have no jurisdiction by declaratory judgment, see Lynn v. United States, 5 Cir., 110 F.2d 586, 588 * * *"[23]

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[20] 28 U. S. C. A. 2201.

[21] Hudspeth County Conservation & Reclamation Dis. No. 1 et al. v. Robbins, et al., 213 F.2d 425 (C. A. 5. 1954).

[22] Ibid., 213 F.2d 425, 426 (C.A.5, 1954).

[23] Ibid., 213 F.2d 425. 432 (C.A.5, 1954).

Not cited by the Court but equally applicable is a more recent decision of that Court than that relied upon, which likewise expressly holds that the United States of America has not waived its sovereign immunity from suits for declaratory judgments.[24] Reason for that rule is readily found in the genesis of the Federal Declaratory Judgment Act. It was not, the Courts have steadfastly held, intended "to extend jurisdiction over an area not already covered or expressly forbidden."[25] In the decision last cited the Court specifically held that the Declaratory Judgment Act did not constitute a waiver by the United States of America of its sovereign immunity from suit.

In a leading decision on the subject this authoritative statement is made: "We * * * are persuaded that the Act [Federal Declaratory Judgment Act] does not extend the consent of the United States to be sued to suits in which the cause of action presented are not of such a nature as to be justiciable in the Courts.

The Act makes no mention of suits against the United States, nor does it give any indication of intention to broaden judicial supervision over the executive or administrative departments of the government."[26]

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[24] Trueman Fertilizer Co. v. Larson, 196 F.2d 910 (C.A.5, 1952).

[25] Di Benedetto v. Morgenthau, 148 F.2d 223, 225 (U.S.C.A. D.C.1945); Cert. dismissed on motion of petitioners, 326 U. S. 686 (1945).

[26] Love v. United States, 108 F.2d 43, 50 (C.A.8, 1939); cert. denied 309 U. S. 673 (1939).

From the authorities which have been reviewed, it is respectfully submitted, this principle of law necessarily follows:

The United States of America has not waived its immunity from suit in actions for declaratory judgments. Whether some other act has waived that immunity will be subsequently considered. However, before turning to that consideration reference will be first made to this question:

Does this Honorable Court have jurisdiction over that phase of the subject cause pursuant to which injunctive relief is sought against the subordinate officials of the Department of the Interior who are named defendants with the United States of America?

This Honorable Court is Without Jurisdiction to Usurp the Powers of the Secretary of the Interior as Prayed for by Plaintiffs—It Has no Jurisdiction in New Mexico.

Essential at this point is a reference to the injunctive relief plaintiffs seek against the defendants Jennings and Resch, the officials of the Bureau of Reclamation joined with the United States of America in the cause. They seek to have this Honorable Court:

"* * * enter a permanent injunction perpetually enjoining and restraining the Defendant reclamation officials. their subordinates, agents and successors from diverting water in such way as to interfere with the rights of the Plaintiffs as set forth in the Court's declaratory judgment."[27]

[27] Plaintiffs' Original Petition, X. Prayer, paragraph 10.3.

Consideration of those declaratory features of the complaint reveal plaintiffs' fatal error in this cause. They seek to have this Honorable Court declare the powers of the Secretary of the Interior in connection with the Elephant Butte Reservoir and Caballo Reservoir and Power Plant, vast irrigation developments, other extensive installations owned by the United States of America in the State of New Mexico; and having thus declared, enter a mandatory injunction directing the Secretary of the Interior to administer those immense facilities in the manner which this Court, in its discretion, determines to be proper. For example:

> Plaintiffs seek to have resolved by this Court in the State of Texas, the power of the defendant subordinate officials to generate electricity at Caballo Dam in the State of New Mexico.[28]

From the face of the complaint it is manifest that the acts involved are those of the Secretary of the Interior, not the defendant officials; that the Secretary of the Interior is empowered by the Congress to perform those acts in the State of New Mexico; that there is involved in those acts of the Secretary of the Interior the exercise of the highest degree of discretion. That aspect of the case is but a single instance of an effort by the plaintiffs to have this Honorable Court assume: [a] in the State of New Mexico [b] the discretionary functions of the Secretary of the Interior. Every controversy concerning which declaratory relief is sought is replete with

[28] Plaintiffs' Original Petition, pages 18-20, Paragraph 9.1 et seq.

other examples where plaintiffs petition this Court to perform the acts of the Secretary of the Interior.

Fundamental obstacles stemming from the basic organization of our Nation bar plaintiffs from adopting the course which they seek to pursue. Our Constitution having established three great departments of the Government—the Legislative—the Executive—and Judicial—precludes the invasion by one branch into the area prescribed for another. Accordingly, it is respectfully submitted, this Honorable Court may not encroach upon the powers of the Executive Branch as plaintiffs would have it. Simply stated, that result ensues from the doctrine of the separation of powers, a doctrine deeply rooted in the guarantees of liberty which underlie our government.

Significantly it was Chief Justice Marshall who delineated the scope of judicial inquiry into matters involving the Executive Branch of the Government.[29] There the Chief Justice defined the powers and functions of the Judiciary in these terms:

"The province of the Court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions * * * which are, by the constitution and laws, submitted to the executive, can never be made in this Court.

"Where [as here] the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a

[29] Marbury v. Madison, 5 U. S. 137, 170 (1803).

Court to control, in any respect, his conduct would be rejected without hesitation."

Adhering to the principle that the Courts will not substitute their discretion and judgment for that of an Executive officer, the Court refused to mandamus the Secretary of the Navy to perform acts in his official capacity respecting the payment of a pension to a widow of a deceased naval officer.[30]

Justice Story, commenting with reference to the subject, stated:

"Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."[31]

As revealed by the authorities which have been reviewed, it is evident in the langauge of the Highest Court: "Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion."[32] Having the power to perform a discretionary act, states the Court in the last-cited case, "* * * the Courts have no power whatever under those circumstances to review his determination by mandamus or injunction."[33]

[30] Decatur v. Paulding, Secretary of the Navy, 39 U. S. 497 (1840).

[31] Martin v. Mott, 25 U. S. 19, 31 (1827).

[32] Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324 (1902).

[33] Ibid., 190 U. S. 316, 325 (1902).

As if in contemplation of this case, the Supreme Court has stated: "* * * it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a Court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such [injunctive] relief cannot be had against the sovereign."[34] Full power has been conferred upon the Secretary of the Interior to construct, operate, maintain and administer the Rio Grande Project. In keeping with that basic precept this authoritative statement has been made in regard to the powers of the Secretary of the Interior in regard to reclamation projects:

"We think the plaintiff [Secretary of the Interior] was fully authorized, by the statutes that have been mentioned and the reservations in the patents and deeds of conveyance, to construct a ditch across defendants' lands using ordinary care.

"It is well settled that the plaintiff [Secretary of the Interior] may construct drainage works as a part of its irrigation system. * * * The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the Courts."[35] It is abundantly manifest from the authorities reviewed that: The Courts have

[34] Larson v. Domestic & Foreign Corp., 337 U. S. 682. 704 (1948).

[35] United States v. Ide, 277 Fed. 373 (C.A.8, 1921), affirmed 263 U.S. 497 (1924).

steadfastly refrained from usurping the powers of the Executive Branch of the Government. There are no grounds for creating in this cause an exception to that rule.

Before concluding this aspect of the matter here under consideration, it is desirable briefly to refer to the jurisdiction of this Court. Congress has defined the broad area in which its powers may be exercised.[36] No emphasis is required in establishing that the State of New Mexico, in which are situated the principal structures of the Rio Grande Project, is beyond the jurisdiction of this Honorable Court. For as recently declared: "* * * A District Court is a separate entity. No District Court has jurisdiction crossing a state boundary."[37]

At this juncture it is desirable to consider the authorities which, it is respectfully submitted, from the standpoint of the defendant subordinate officials of the Bureau of Reclamation, constitute the Secretary of the Interior an indispensable party to the subject cause.

The Secretary of the Interior is an Indispensable Party to the Cause—He Has Not Been and Cannot be Joined in this Proceeding.

Reviewed in detail by the United States Court of Appeals for the ifth Circuit[38] are the powers of the

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[36] 28 U. S. C. 124.

[37] United States v. 11 Cases, More or Less, Ido-Pheno-Chon, et al., 94 F. Supp. 925, 926 (U.S.D.C.D. Ore. 1950).

[38] Hudspeth County Conservation & Reclamation Dist. No. 1 et al. v. Robbins, et al., 213 F.2d 423 (C.A.5, 1954).

subordinate officials of the Bureau of Reclamation named defendants in the cause. There, as here, the plaintiffs proceeded against the Regional Director of the Bureau of Reclamation and subordinates. Specifically, in regard to injunction proceedings against the officials of the United States, the Court declared: "Since Larson v. Domestic & Foreign Corp., supra, a very strict test must be applied when the suit is one not for damage but for specific relief [as in this case], such as injunction either directing or restraining the defendant officers' actions * * *"[39] The Court in that decision then stated: "In a case involving this same project, the Tenth Circuit arrived at the conclusion that the action [an injunction against subordinate officials of the Bureau of Reclamation] was in essence a suit against the United States to which it had not consented and that it, therefore, must fail. State of New Mexico v. Backer, 10 Cir., 199 F.2d 426."[40]

That last cited case of New Mexico v. Backer is likewise authority for a proposition of law directly involved in this cause. There the Court of Appeals for the Tenth Circuit stated in connection with the Rio Grande Project: "The United States could not hold or operate this vast project except through its officials and agents. Backer was performing these functions for the Secretary of the Interior and under his instructions. Whatever he did, he did for the Secretary * * *."[41] The indispensability of the Secretary of the Interior under the circumstances such as pre-

[39] Ibid., 213 F.2d 425 432 (C.A.5, 1954).

[40] Ibid., 213 F.2d 425, 432 (C.A.5, 1954).

[41] State of New Mexico v. Backer, 199 F.2d 426, 428 (C.A.10, 1952).

vail in this case, was declared: "The operation of the [Rio Grande] project and facilities depended upon the flow of water from the reservoir. If this flow could be enjoined or affected by Court decree or order directed to Backer, he would be under the direction of the Court and not his superiors as representatives of the United States.

It would be a complete ouster of the United States over the control and management of its own property and facilities [of the Rio Grande Project here involved]."[42] (Emphasis supplied.)

That opinion, it will be observed, is based largely upon the Supreme Court decision cited above.[43]

Very recently, the Supreme Court analyzed the proposition which precludes actions against the subordinate officials of the character here involved who are carrying out the instructions of an official charged by Congress with the responsibility to effectuate its will.[44] It is free from doubt in that regard that the Secretary of the Interior is a Cabinet Official residing in the District of Columbia who administers the Rio Grande Project. Under cirtually the same circumstances, the Supreme Court in the case last cited ruled [1] the official in charge—here the Secretary of the Interior—could not be served outside of the District of Columbia; [2] the only person before the Court was the subordinate official; [3] "* * * no relief could possibly be granted against' the sub-

[42] Ibid., 199 F.2d 426, 428 (C.A.10, 1952).

[43] Larson v. Domestic & Foreign Corp., 337 U. S. 682 (1948).

[44] Blackmar v. Guerre, 342 U. S. 512 (1951).

ordinate official because of the indispensability of his superior residing in the District of Columbia; [4] the Court was without jurisdiction; [5] the case should have been dismissed by the Court below.[45] Pertinent in regard to the case last cited is this fact—the Supreme Court in rendering its decision reversed an opinion of the Court of Appeals for the Fifth Circuit.

Relative to the powers of a Court to assume jurisdiction under the circumstances of this case, reference is made to another decision of the United States Court of Appeals for the Fifth Circuit.[46] There the Court stated that: "It has never held, in the face of the controlling authorities it could not hold * * * that a Court had jurisdiction to direct or control the policies of the United States by suit against an official. * * * The suit [that was then before it], if not a suit against the United States, as we think it is, is certainly a suit requiring the presence as an indispensable party of the Postmaster General, and it could not have been properly maintained without him."[47]

It is respectfully submitted in the light of the cited authorities that:

[A] The Secretary of the Interior is an indispensable party;

[B] This Court does not have jurisdiction of the Secretary of the Interior and this cause, insofar as it relates to the subordinate officials of the Bureau of Reclamation, must be dismissed.

[45] Ibid., 342 U. S. 512, 516 (1951).
[46] Payne v. Fite, 184 F.2d 977 (C.A.5, 1950).
[47] Ibid., 184 F.2d 977, 980(C.A.5, 1950).

The Decision of the Court of Appeals for the Fifth Circuit in Plaintiffs' Earlier Case is Binding Upon This Honorable Court in Regard to the Subordinate Officials of the Bureau of Reclamation and This Action Against Them Should Be Dismissed.

There has been reviewed above the decision of the United States Court of Appeals for the Fifth Circuit in the case of Hudspeth County Conservation & Reclamation Dist. No. 1 et al. v. Robbins, Regional Director of the Bureau of Reclamation, et al.[48] The facts of this case, insofar as the defendant officials of the Bureau of Reclamation are concerned, are indistinguishable from the earlier and last-cited case. Under the circumstances, it is respectfully submitted, and for the reasons there expressed, this cause against those defendants should be dismissed. Few principles of law are more firmly established than that declaring:

A federal district Court, when considering, as here, facts which are indistinguishable from those in an earlier decision of the Court of Appeals of the Circuit in which it is located, is bound by that decision.[49]

A correlative doctrine equally applicable in this case is:

Great weight is to be attributed by a district Court to decisions of the Court of Appeals of another Cir-

[48] 213 F.2d 425 (C.A.5, 1954); cert. denied 348 U. S. 833 (1954).

[49] Houston Farms Development Co., v. Commissioner of Internal Revenue, 194 F.2d 520 (C.A.5 1952).

cuit when not in conflict with those of the Circuit in which it is located.[50]

Based upon those principles of law, it is respectfully submitted that the case which plaintiffs seek to prosecute against the defendant officials of the Bureau of Reclamation should be dismissed in view of the decision in the earlier Hudspeth case.[51] As discussed at length above, both the Court of Appeals for the Fifth Circuit and that for the Tenth Circuit[52] have declared that an action of the character here involved may not be maintained against those officials.

In summary, relative to the lack of this Honorable Court's jurisdiction to entertain the subject case against the defendant officials of the Bureau of Reclamation, these salient facts and principles of law are reviewed:

1. The action may not be maintained by reason of the decision of the Court of Appeals for the Fifth Circuit declaring that virtually identically the same cause was in truth and fact against the United States of America[53] and that it had not waived its sovereign immunity from suit for (a) declaratory judgments, (b) injunctive relief.

2. The action against the defendant subordinate officials of the Bureau of Reclamation must fail be-

[50] In Re Hadden, 142 F.2d 896 (C.A.6. 1944); Cert. Dis. 323 U.S. 752 (1944).

[51] 213 F.2d 425 (C.A.5, 1954); cert. denied 348 U. S. 833 (1954).

[52] State of New Mexico v. Backer, 199 F.2d 426 (C.A. 10. 1952).

[53] 213 F.2d 425, 432.

cause they have no power independent of that delegated to them by the Secretary of the Interior, an indispensable party, who has not been and cannot be joined as a party to the cause.[54]

The attempted joinder in this cause of the defendant officials of the Bureau of Reclamation is violative of the mandate of the Court of Appeals for the Fifth Circuit; a dismissal, it is respectfully submitted, must necessarily ensue.

At this juncture consideration will be given to the final phase of this memorandum regarding the applicability of 43 U. S. C. 666, upon which plaintiffs purport to rely.

The Federal Declaratory Judgment Act[55] Has Not Been Amended by The Rider to the Department of Justice Appropriation Act of 1952; C.651, Title II, 208, 66 Stat. 560, 43 U. S. C. 666, Pursuant to Which Plaintiffs Seek to Invoke This Court's Jurisdiction Against the United States of America.

A true perspective of the course pursued by plaintiffs in this cause is gained by consideration of these quoted excerpts from the complaint:

"[a] The Government claims to be the owner of a right to the use of water to propel Government-owned power facilities at Elephant Butte Dam."[56]

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[54] New Mexico v. Backer, 199 F.2d 426, 428 (C.A.10 1952); Blackmar v. Guerre, 342 U. S. 512 (1951).

[55] 28 U. S. C. 2201.

[56] Plaintiffs' Original Petition, page 3, paragraph 1.6, third sentence.

This Court, it is respectfully submitted, is entirely without jurisdiction over the "Government owned power facilities at Elephant Butte Dam."[57] Those properties are in the State of New Mexico. Any judgment, order or decree which might emanate from this Court regarding those properties would be without force and effect. Wholly aside from that fundamental barrier is the fact that Courts consistently refrain from intruding upon the jurisdiction of other Courts—in this instance the tribunals, State and Federal, of a sister State.

Further, in regard to the quoted averment from the complaint respecting the ownership by the United States of America of the Elephant Butte Dam and power facilities, all of which are located in the State of New Mexico, reference is made to the Seventh Controversy in the complaint respecting "the diversions and consumptive uses of water by the Defendant reclamation officials for generation of hydroelectric power."[58] It is apparent that the relief, very largely, which plaintiffs seek can be granted only by a Court having jurisdiction in the State of New Mexico. This Honorable Court, as above emphasized, does not have jurisdiction in that State; could not for that reason "enter a permanent injunction perpetually enjoining and restraining the Defendant reclamation officials, * * *" for which plaintiffs pray.[59]

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[57] 28 U.S.C. 124. Please see supra page 1,39.

[58] Plaintiffs' Original Petition, IX Seventh Controversy: Diversions for Power, paragraph 9.1.

[59] Plaintiffs' Original Petition, X. Prayer, Paragraph 10.3.

Reference is next made to this assertion:

"[b] The United States is the owner of certain rights to the use of water on about 400 acres of land comprising the Federal Detention Farm at La Tuna, Texas."[60]

That is the sole reference in the complaint to the 400 acres in question. No averment is set forth indicating a conflict between the United States of America and the plaintiffs in regard to the "Federal Detention Farm."

A. Plaintiffs Allege No "actual controversy" Between Them and the United States of America in Regard to Rights to the Use of Water.

From the complaint it is to be observed that the plaintiffs allude to rights to the use of water claimed by the United States of America in connection with the Federal Detention Farm. Yet there is no assertion that there is a conflict between the United States of America and the plaintiffs in connection with those rights to the use of water. That the Court does not have jurisdiction under the circumstances is manifest from the express language of the Federal Declaratory Judgment Act which states: "In a case of actual controversy within its jurisdiction * * * any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, * * *."[61] On the subject it has been declared that, "An actual controversy is essential to a declara-

[60] Plaintiffs' Original Petition, page 3, paragraph 1.6.
[61] 28 U. S. C. A. 2201.

tory judgment suit, it is so provided in effect by the Declaratory Judgments Act. Indeed, the existence of an actual controversy is "a matter of *fundamental Jurisdiction, constitutionally* requisite to bring any kind of a cause within the federal judicial power."[62] (Emphasis supplied.)

Applying that principle to the complaint it becomes eminently clear that the conditions for invoking Federal jurisdiction are not present. The controversies alluded to do not involve, insofar as the face of the complaint is concerned, any claimed rights to the use of water of the United States of America. In those instances where it might be urged that there is a conflict it is to be observed that the structures alluded to are situated in the State of New Mexico and for reasons expressed present problems which could not be adjudicated by this Honorable Court.

The proposition may be succinctly stated as follows: Plaintiffs seek a declaratory judgment on construction of the Reclamation Act, the Warren Act, and contracts entered into by the Secretary of the Interior pursuant to those Acts. Cognizant that there has been no waiver of sovereign immunity from suit under the Declaratory Judgment Act, they seek to invoke the provisions of 43 U. S. C. 666 involving the general adjudication of rights to the use of water. They have thus injected into the cause rights to the use of water for the Federal Detention Farm; rights

[62] 15 Cyc. Fed. Proc., 3d ed., Sec. 90.12; See Constitution of the United States of America, Article III, Sec 2: "The judicial Power shall extend to all Cases, in Law and Equity * * * to Controversies to which the United States shall be a Party; * * *."

which are in no way germane to the declaratory judgment which they actually seek. It is thus obvious that there is no controversy in regard to those rights. Consequently, for the reasons expressed above, plaintiffs have failed to state a controversy pursuant to which they could invoke the provisions of the Federal Declaratory Judgment Act. It is further emphasized that virtually the entire proceeding entails structures and properties situated in the State of New Mexico over which this Court does not have jurisdiction, assuming that a controversy had in truth been stated.[63]

B. No Reference is Made to; There Is Nothing to indicate An Intention on the Part of Congress to Amend the Federal Declaratory Judgment Act by 43 U. S. C. 666.

There have been reviewed in detail the authorities disclosing that the Federal Declaratory Judgment Act did not constitute a waiver of sovereign immunity from suit by the United States of America. As pointed out by the decisions previously cited: "The [Federal Declaratory Judgment] Act makes no mention of suits against the United States, nor does it give any indication of intention to broaden judicial supervision over the executive or administrative departments of the government."[64] A review of the express language of 43 U. S. C. 666 fails to reveal any intention on the

[63] For additional authorities in regard to the necessity of an "actual controversy" please refer to 16 Am. Jur., Declaratory Judgments, Sec. 9, pages 82 et seq.: 87 A.L.R. 1205 et seq.

[64] Love v. United States, 108 F.2d 43, 50 (C.A.8, 1939); cert. denied 309 U. S. 673 (1939).

part of Congress to amend the Federal Declaratory Judgment Act. Indeed, as will be subsequently considered, 43 U. S. C. 666 does not contemplate the kind and type of action which plaintiffs seek to institute. Based upon that fact, this general principle of statutory construction is squarely in point: "To be effective, an amendment of a prior act ordinarily must be express. Amendments by implication * * * are not favored and will not be upheld in doubtful cases. The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together."[65] In these concise terms our highest Court has established the principle which, it is respectfully submitted, should govern here: "* * * in any case the modification by implication of the settled construction of an earlier and different section is not favored."[66] As the Court adhered to that doctrine respecting new legislation relating to the same subject it follows a fortiori that the principles would be applied where, as here, the plaintiffs seek to have the Federal Declaratory Judgment Act amended by a rider to the Department of Justice Appropriation Act of 1952.

Simply stated, the plaintiffs seek to invoke the jurisdiction of this Honorable Court pursuant to 43 U. S. C. 666 and seek declaratory relief wholly foreign to the objects of the statute last cited.

[65] 1 Sutherland Statutory Construction, 3d ed., Sec. 1913.

[66] United States v. Madigan, 300 U. S. 500, 506 (1936).

In the light of the principles which have been reviewed,[67] it is manifest that plaintiffs are precluded from adopting that course.

C. The Cases to Which 43 U. S. C. 666 Has Application Are Sui Generis, Relating Only To Proceedings For the General Adjudication of Rights to the Use of Water.

Reference is made to the legislative history of 43 U. S. C. 666 for there will be found the objectives of that law. On the subject the then Chairman of the Committee on the Judiciary declared that the Act "*is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.*"[68] (Emphasis supplied.) It is manifest that the action herein involved contemplates not the general adjudication of rights to the use of water, rather it is intended to secure a declaratory judgment respecting a variety of questions concerning certain laws and contracts. Clearly there is no relationship between an action for relief of this character and a general adjudication suit.[69]

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[67] See Belknap v. Schild, 161 U. S. 10, 16 (1895).

[68] Report No. 755, 82d Congress, 1st Session, "Authorizing Suits Against the United States to Adjudicate and Administer Water Rights," page 9.

[69] See in that connection "Adjudication of Water Rights, Hearings Before a Subcommittee of the Committee on the Judiciary, United States Senate, Eighty-second Congress, First Session on S. 18, A Bill to Authorize Suits Against the United States to Adjudicate and Administer Water Rights." See also Report No. 755, Parts 1 and 2, 82d Congress, 1st Sess.

Reference in that regard is made to the definition of general adjudication proceedings as contemplated by 43 U. S. C. 666: "The proceedings are purely statutory, and are in rem or quasi in rem."[70] They have been further described as not being "an ordinary action or proceeding," but rather sui generis designed with the objective of adjudicating; as the Chairman of the Committee on the Judiciary stated: "all of the rights of various owners on a given stream." Moreover, the statutes relating to general adjudication proceedings of the character contemplated by 43 U. S. C. 666 "are in the nature of police regulations, to secure the orderly distribution of water for irrigation purposes; and to this end they provide a system of procedure for determining the priorities."[71]

From a consideration of the complaint it is evident that plaintiffs do not, and for reasons subsequently to be emphasized, could not seek a general adjudication in the cause in question. Under the circumstances, therefore, this rule enunciated by the Supreme Court will govern: The United States of America "cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress."[72] It is eminently clear, based upon the authorities reviewed, that [a] plaintiffs have failed to bring their cause within any waiver of sovereign immunity from suit; [b] the action must be dismissed.

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[70] Wiel, Water Rights in the Western States, 3d ed., vol. 2, page 1125, Sec. 1228.

[71] Ibid., page 1126.

[72] Belknap v. Schild, 161 U. S. 10, 16 (1895).

D. There Can Be No Class Action of the Character Which Plaintiffs Seek to Initiate in This Cause.

There has been discussed at length the lack of this Honorable Court's jurisdiction to entertain this cause. Quite aside from those basic precepts the action must fail for an additional reason: Plaintiffs seek to litigate a reach of the Rio Grande which extends literally hundreds of miles into the State of New Mexico. Moreover, as plaintiffs allege, and as this Honorable Court will take judicial notice, the quantity of water available in the Rio Grande in the reach in question is far short of the demands. Thus each and every owner who asserts rights to the use of water in the stream in question is in competition with every other owner in that category. Manifestly, therefore, there can be no class action in the true sense of the word, "* * * class actions are not authorized where the parties sought to be represented have claims which are distinct and a subject of an independent action, even though there may be a common question of law involved."[73] From the same authority this equally pertinent statement is taken: "* * * though a class action is binding on all members for whom the representatives may speak—those whose interests are in accord with those who bring or defend the action—according to Supreme Court a class action is not binding upon those whose interests are at variance with the position taken by the true members of the class. Nor, under the doctrine of such case, is it binding in simple 'spurious' class action situations except upon those who are actually parties and their privies."[74]

[73] 6 Cyc. Fed. Proc., sec. 23.10, p. 674.

[74] 6 Cyc. Fed. Proc., sec. 2335, p. 698.

Reasons which transcend rules of procedure and practice give rise to the principles thus enunciated. They pertain to the basic guarantees of the Constitution. Justice Stone speaking for the Highest Court with reference to the subject, declared: "* * * selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far * * * Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of the litigants."[75]

In summary this precise statement reveals the vital error in plaintiffs' efforts to initiate a class action: "Persons who were not parties to a former suit cannot be bound by a decree therein under the doctrine of virtual representation, unless it appears that the parties appearing as representatives therein had interests that were, in fact, similar to and consistent with those of the other members of the purported class."[76]

Those authorities, it is respectfully submitted, as stated above, prevent the initiation by plaintiffs,

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[75] Hansberry v. Lee, 311 U. S. 32, 45 (1940).

[76] 132 A. L. R. 750.

wholly aside from the jurisdictional objections which have been raised, of a class action as they have attempted.

There Is No Allegation of Irreparable Damage to Support the Injunctive Proceeding: Plaintiffs Have a Plain, Speedy and Adequate Remedy at Law.

Finally, it is to be observed from the face of the complaint that there is no allegation that the acts of the subordinate officials of the Bureau of Reclamation have resulted in irreparable damage to the plaintiffs. It is, of course, elementary that before the harsh remedy of injunction is available, irreparable damage must be alleged and proved.[77] Equally important is the fact that if there has been an invasion of the rights to the use of water of the plaintiffs, they have a plain, speedy and adequate remedy at law against the United States of America.[78] Under the circumstances it is again respectfully submitted that plaintiffs have failed to allege a cause pursuant to which relief could be granted.

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[77] 28 Am. Jur., Injunctions, Sec. 24, p. 217.

[78] Hurley v. Kincaid, 235 U. S. 95 (1931); United States v. Gerlach Live Stock Company, 339 U. S. 725 (1949).

Conclusion.

This Honorable Court is respectfully requested to dismiss this proceeding on the grounds and for the reasons which have been stated.

(S.) J. LEE RANKIN,
(J. Lee Rankin),
Assistant Attorney General,

(S.) RUSSELL B. WINE,
(Russell B. Wine),
United States Attorney,

(S.) HOLVEY WILLIAMS,
Asst. U. S. Attorney.

(S.) WILLIAM H. VEEDER,
(William H. Veeder),
Attorney, Department of Justice.

Dated: November 30, 1955.

Copy of this motion mailed to Ted Andress, El Paso National Bank Building, El Paso, Texas, and Morgan Hunter, Brown Building, Austin, Texas, attorneys of record, December 6, 1955.

(S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant U. S. Attorney.

El Paso, Texas.

FINAL ORDER OF DISMISSAL.

(Filed March 1, 1956.)

On the 27th day of January A. D. 1956, came on to be heard by the Court the Motion to Dismiss and the Supplemental Motion to Dismiss filed by Defendants, and came the parties by their respective attorneys of record and by briefs and oral arguments to the Court, and the Plaintiffs requested leave to file the Plaintiffs' First Amended Complaint filed herein with Plaintiffs' Motion to file and said Motion for leave to file Plaintiffs' First Amended Complaint having been granted by the Court, and the Court having heard and considered the Motion of the United States of America to dismiss said complaint and the Motion of all other Defendants to dismiss said complaint is of the opinion that this Court lacks jurisdiction over the United States of America which has neither consented to be sued or in any manner waived its sovereign immunity from suits of the character set forth in Plaintiffs' First Amended Complaint, that therefore the motions to dismiss should be sustained, and that it is unnecessary to pass on the other motions and grounds presented:

It Is, Therefore, Ordered, Adjudged And Decreed by the Court that Plaintiffs' First Amended Complaint be, and the same is hereby, dismissed, and that Defendants do have and recover of Plaintiffs all costs in this behalf incurred.

To which action of the Court the Plaintiffs in open Court excepted.

Signed And Entered this 1st day of March, A. D. 1956.

(S.) R. E. THOMASON,
United States District Court
for the Western District of
Texas, El Paso Division.

PLAINTIFFS' NOTICE OF APPEAL.

(Filed April 25, 1956.)

Notice is hereby given that Ronald Miller, W. F. Hargrove, Jr., J. B. Williams, Kenneth Jones and Lenox W. Moore, Individually and in their representative capacity on behalf of all other Hudspeth District land owners and water users similarly situated, and Hudspeth County Conservation District No. 1, being all of the Plaintiffs in the above action, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the final order and judgment of dismissal of Plaintiffs' cause of action with prejudice, which order and judgment was entered in this action on March 1, 1956.

(S.) W. MORGAN HUNTER,
(W. Morgan Hunter),
702 Brown Building,
Austin, Texas.

(S.) THEODORE ANDRESS,
(Theodore Andress),
Attorneys for Appellants.
El Paso National Bank Bldg.,
El Paso, Texas.

Of Counsel:
ANDRESS, LIPSCOMB, PETICOLAS
& FISK,
El Paso, Texas,
and
POWELL, WIRTZ,
RAUHUT & McGINNIS,
Austin, Texas.

True copies hereof served on counsel for all Defendants this 25 day of April, 1956.

(S.) TED ANDRESS,
Atty. for Plaintiff.

COST BOND ON APPEAL.

(Filed April 25, 1956.)

Know All Men By These Presents:

That we, Ronald Miller, W. F. Hargrove, Jr., J. B. Williams, Kenneth Jones and Lenox W. Moore, individually and on behalf of all other land owners in the Hudspeth County Conservation and Reclamation District No. 1, of Hudspeth County, Texas, and the Hudspeth County Conservation and Reclamation District No. 1, a municipal corporation, as principals, and American Employers' Insurance Company, a corporation, and Hal Daugherty and Al W. Uhlig, as sureties, acknowledge ourselves to be jointly indebted to Robert W. Jennings, W. F. Resch, T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Hold, Tom Holmsley, Paul Harvey, Sr., and

S. Y. Wilson, individually and representatives of all land owners and water users claiming adversely to Plaintiffs in rights to the use for irrigation of the waters of the Rio Grande, or the return flow therefrom, between Elephant Butte Dam and the El Paso-Hudspeth County line, and El Paso County Water Improvement District No. 1 and the United States of America, appellees in the above cause, in the sum of Two Hundred Fifty ($250.00) Dollars, conditioned that, whereas, on the 1st day of March, A. D. 1956, in the District Court of the United States for the Western District of Texas; in a suit pending in that Court wherein Ronald Miller, W. F. Hargrove, Jr., J. B. Williams, Kenneth Jones, Lenox W. Moore, individually and on behalf of all other land owners in the Hudspeth County Conservation and Reclamation District No. 1, of Hudspeth County, Texas, and the Hudspeth County Conservation and Reclamation District No. 1, a municipal corporation, were Plaintiffs, and Robert W. Jennings, W. F. Resch, T. D. Lovelady, Louise Young Lovelady, Francis J. Warnock, J. S. Samples, Marion Briggs, Lee Moor, Gowan Jones, Will Hold, Tom Holmsley, Paul Harvey, Sr., and S Y Wilson, individually and representatives of all land owners and water users claiming adversely to Plaintiffs in rights to the use for irrigation of the waters of the Rio Grande, or the return flow therefrom, between Elephant Butte Dam and the El Paso-Hudspeth County line; and El Paso County Water Improvement District No. 1 and the United States of America, were Defendants, numbered on the Civil Docket as 1683, a judgment of dismissal was rendered against the said Plaintiffs, and the said Plaintiffs having filed in the Office of the Clerk of the District Court a Notice of Appeal to the

United States Circuit Court of Appeals for the 5th Circuit, to be holden in the City of New Orleans, in the State of Louisiana, at the times and places provided by law;

Now, the condition of the above obligation is such that if the said Plaintiffs, principals herein, shall prosecute their appeal to effect and answer all costs, if the appeal is dismissed or the judgment affirmed, or such costs as the appellate Court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

(S.) RONALD MILLER,
(S.) W. F. HARGROVE, JR.,
(S.) J. B. WILLIAMS,
(S.) KENNETH JONES,
(S.) LENOX W. MOORE,
Individually and as representative of all the land owners within the boundaries of the Hudspeth County Conservation and Reclamation District No. 1, Hudspeth County, Texas.

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1, Hudspeth County, Texas,

By (S.) RONALD MILLER,
President,
Principals.

Attest:
(S.) J. B. WILLIAMS,
Secretary.

AMERICAN EMPLOYERS' INSURANCE COMPANY, a corporation,
By (S.) J. C. ECHLIN,
(J. C. Echlin),
Attorney in Fact.
(S.) HAL DAUGHERTY,
(S.) AL W. UHLIG,
Sureties.

(Seal)

True copies hereof served on counsel for all defendants April 25, 1956.
(S.) TED ANDRESS,
Atty. for Plaintiff.

APPELLANTS' DESIGNATION OF RECORD AND STATEMENT OF POINTS ON APPEAL.

(Filed April 25, 1956.)

Appellants (Plaintiffs) designate the following portions of the record and proceedings to be contained in the record on appeal in this action:

(1) Petition for Removal (with exhibits),

(2) Co-Petition for Removal (without exhibits),

(3) Removal Bond,

(4) Proof of service of Removal Papers,

(5) Order Granting Leave to File Plaintiffs' First Amended Complaint,

(6) Plaintiffs' First Amended Complaint,

(7) Defendants' Motion to Dismiss,

(8) Defendants' Answer,

(9) Defendants' Supplemental Motion to Dismiss,

(10) Final Order and Judgment of Dismissal (entered March 1, 1956),

(11) Plaintiffs' Notice of Appeal,

(12) Appeal Bond and

(13) Appellants' Designation of Record and Statement of Points on Appeal.

APPELLANTS' STATEMENT OF POINTS ON APPEAL.

The points upon which Appellants (Plaintiffs) intend to rely on this appeal are as follows:

(1) The trial Court erred in holding that the United States has not by the terms and provisions of the Act of July 10, 1952, C. 651, Title 2, Sec. 208, 66 Stat. 560 (43 U.S.C.A. Sec. 666) consented to be sued or in

any manner waived its sovereign immunity from suits of the character set forth in Plaintiffs' First Amended Complaint.

(2) The trial Court erred in granting Defendants' Motion to Dismiss and Supplemental Motion to Dismiss.

(S.) W. MORGAN HUNTER,
(W. Morgan Hunter),
702 Brown Building,
Austin, Texas.

(S.) THEODORE ANDRESS,
(Theodore Andress),
Attorneys for Appellants.
El Paso National Bank Bldg.,
El Paso, Texas.

Of Counsel:
ANDRESS, LIPSCOMB, PETICOLAS
& FISK,
El Paso, Texas,
and
POWELL, WIRTZ, RAUHUT
& McGINNIS,
Austin, Texas.

True copies hereof served on counsel for all defendants April 25, 1956.

(S.) TED ANDRESS

AMENDED DESIGNATION OF ADDITIONAL RECORD BY APPELLEES.

(Filed May 23, 1956.)

All appellees (defendants) designate the following items to be included in the record on appeal in addition to those called for by appellants (plaintiffs) in their designation filed herein on April 25, 1956:

1. Compared copy of contract between the United States of America and the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1, dated the 10th day of May, 1928.

2. Certified copy of contract between the United States and the Elephant Butte Irrigation District dated the 9th day of November, 1937.

3. This amended designation in lieu of the original designation of additional record by appellees hereinbefore filed.

LOUIS A. SCOTT,
1100 First National Bldg.,
El Paso, Texas.

EUGENE T. EDWARDS,
11th Floor Bassett Tower,
El Paso, Texas.

By (S.) EUGENE T. EDWARDS,
(Eugene T. Edwards),
Attorneys for all appellees (defendants) except the United States of America.

RUSSELL B. WINE,
United States Attorney,

By (S.) HOLVEY WILLIAMS,
(Holvey Williams),
Assistant U. S. Attorney,
Attorneys for United
States of America.

May 22, 1956. Receipt of two copies of the foregoing amended designation of additional record by appellees is acknowledged.

(S.) W. C. PETICOLAS,
Attorney for Appellants,
(Plaintiffs).

D-1.

Filed: Jan. 27-1956.

CA # 1683.
ACV.
Symbol No. I 16r-215.

This Agreement, made this 10th day of May, 1928, in pursuance of the act of Congress approved June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, between The United States Of America, hereinafter styled the United States, represented by the officer executing this contract, and the Elephant Butte Irrigation District, a corporation organized and existing under the laws of the State of New Mexico, and El Paso County Water Improvement District No. 1, a corporation organized and existing under the laws of the State of Texas, said corporations hereinafter collectively styled the Districts, their successors and assigns,

Witnesseth That:

Recitals.

Whereas, the districts have heretofore contracted with the United States for the repayment of the costs of construction of the storage and distribution system constituting the Rio Grande Federal Irrigation Project, and

Whereas, the districts are now desirous of constructing, operating and maintaining certain works for the development of hydroelectric power and are desirous of expanding such development from time to time to the end that the full potential power resources of the Rio Grande project may be ultimately developed, and

Whereas, the construction, operation and maintenance of such works in accordance with such detailed plans as may hereafter be approved by the Secretary of the Interior may be accomplished without impairing the efficiency of the Rio Grande Project, and

Whereas, the districts propose to generate power primarily for consumption for municipal purposes, and

Whereas, the Secretary of the Interior is authorized by the Act of February 24, 1911 (36 Stat. 930), to lease the privilege of power development on the Rio Grande Project for a period not to exceed fifty years with the consent and approval of the districts,

Now, Therefore, in consideration of the terms and mutual covenants and agreements hereinafter contained, it is covenanted and agreed by and between the parties hereto as follows:

Article 1. Power Privilege.

Pursuant to the provisions of the Act of Congress approved February 24, 1911, (36 Stat. 930), the districts shall have the privilege of constructing, operating and maintaining a power plant or plants and all necessary works incident thereto for the full development of hydroelectric power, making use of all facilities, title to which may be in the United States as a part of the Rio Grande Project, for that purpose, subject to the provisions for examination and approval by the Secretary of the Interior, as hereinafter set forth, of the utilization of energy and plans for development as may be proposed by the districts from time to time hereafter.

Article 2. Release of Water.

The amount of water which shall be released from the Elephant Butte reservoir or elsewhere through penstock openings in said dam or otherwise shall be that amount only which results from regulation of said reservoir or other works to fulfill the demands for irrigation or flood control and the obligations arising under treaty with Mexico proclaimed January 16, 1906, (34 Stat. 2953). In determining the amount of water available for power purposes the decision of the Secretary of the Interior or his representatives designated by him to act for this purpose shall control and no obligation is hereby created upon the

United States to release stored waters in any manner other than that in which stored waters would be released for irrigation purposes independently of such hydroelectric power development.

Article 3. Approval of Plans.

All general and detailed plans and specifications for the exercise by the districts of the power privilege hereby conferred, shall be subject to approval by the Secretary of the Interior and all work which may hereafter be done by the districts, its agents, employees, contractors and sub-contractors in construction, operation and maintenance pursuant to such plans, shall be subject to inspection by the United States. The cost of such inspection shall be paid by the districts and in determining the amount thereof the books and records of the Bureau of Reclamation shall be deemed conclusive evidence.

No plans shall be approved that would, in the opinion of the Secretary of the Interior, when put into effect, result in interference with existing works or in impeding or unduly interfering with storage or delivery of water for irrigation purposes in accordance with the Treaty with Mexico hereinabove referred to, and/or pursuant to existing contrats with the districts.

Article 4. Liens.

The districts shall have the right to encumber by liens to secure bonds issued and/or other obligations incurred incident to power development, all power plants and incidental works which they may here-

after construct for the purpose of hydroelectric development. The districts shall have the right to so encumber any and all rights and privileges conferred by or arising out of this contract insofar as the same may be necessary in financing the power development herein authorized; provided, however, that this provision shall not be construed as authorizing any encumbrance or liens of any character whatsoever upon or against the said Elephant Butte Dam or reservoir or any other property of the United States, it being the intention that such encumbrance or lien may be directed only against and applied to such power plant or plants and necessary facilities connected therewith as may be hereafter constructed or provided by and at the expense of said districts and the power privilege to the extent hereinabove set forth.

Article 5. Term.

This agreement shall be effective for a period of 50 years from the date of its execution unless sooner terminated by the parties hereto. Within eighteen months after termination of this agreement the districts shall have the right to remove any and all structures, equipment, machinery and plant which they may have constructed for hydroelectric development pursuant to this agreement, to any extent possible so long as such removal may be made without damage to the Elephant Butte dam and distribution works thereunder, or other property title to which at such time may be vested in the United States. Upon the failure of the districts to make such removal within the time stated, the United States may at its option remove such works and sell the same to pay the cost of removal.

Article 6. Damages.

The districts hereby waive all claim for damages of any nature whatsoever incident to or arising out of the proper repair or operation of the Rio Grande Project works insofar as the same may affect the construction or operation of hydroelectric power development plant or plants and waive all claims of any nature whatsoever incident to the increasing or diminishing the amounts of water released by the United States in the operation of said project.

The districts shall save the United States harmless from any damage resulting to the project works incident to the construction, operation or maintenance of works for hydroelectric power development.

This agreement shall not be construed to constitute the United States a participant in a joint enterprise with said districts for the development of hydroelectric power and the districts shall be solely liable for and save the United States harmless from all damage of any nature whatsoever to persons or property, arising out of or incident to the development or transmission of hydroelectric power.

Article 7. Power To Be Furnished.

The right is reserved to the United States to continue to operate the power plant now operated by it at Elephant Butte Dam except in the event that it becomes necessary to move or discontinue it in order to render more feasible the power development hereunder by the districts in which event the districts shall furnish to the United States without cost to it,

electrical energy for all purposes for which the said plant now supplies energy or for which it was intended to supply energy.

Article 8. Payment For Privilege.

For the power privilege by this agreement created in favor of the districts, the said districts shall, on or before each March first, pay to the United States a sum equivalent to the total amount of revenue received from the sale of power for the preceding calendar year less the following deductions:

(1) All amounts necessary to the payment of interest on and the current retirement installment with previous deficits, if any, of the bonded and/or other obligation of the districts relating to power development hereunder.

(2) Any amounts expended during the preceding calendar year in the maintenance and operation of all hydroelectric works constructed by the Districts.

(3) Any deficit incurred incident to the operation of all such hydroelectric works for the preceding calendar year or years.

(4) Such other amount or sums which may, in subserving the ends of good business practice, be designated by the joint action of the districts and approved by the Secretary of the Interior, to be set aside as a reserve for future expenditures incident to the proper preservation, operation, improvement and betterment of the hydroelectric works constructed by the Districts.

Provided, however, that after payment has been made by the districts, of all sums due the United States under present or future contracts for the repayment of the cost of construction operation and maintenance of the Rio Grande project, the amount to be paid by said districts during the life of and pursuant to this agreement shall be the sum of ten dollars ($10.00) per annum.

All money received by the United States hereunder shall be credited annually, first on account of Rio Grande Irrigation project construction charged, second, on account of Rio Grande Irrigation project operation and maintenance charges, and third, as the districts may direct, such credits to be received by each of the districts respectively in the proportion in which its irrigable acreage therein for which water shall be provided bears to the total of such irrigable acreage of the said Rio Grande Irrigation Project for which water shall be provided.

Article 9. Assignment.

No interest in this agreement except as herein specifically authorized, shall be assigned by the districts without first having obtained the consent thereto in writing by the Secretary of the Interior. The provisions of this agreement shall be binding upon the assigns and successors in interest of the respective parties hereto.

Article 10. Appropriation Clause.

This contract is subject to appropriations being made by Congress, from year to year, of moneys sufficient to do the work provided for herein. No liability shall accrue against the United States by reason of such moneys not being appropriated. Should only a

portion of the moneys necessary to complete the work be so provided and expended, then the amount to be repaid by the District to the United States for such work shall be reduced to an amount equal to the sum actually expended.

Article 11. Officials Not To Benefit.

No Member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or any benefit to arise therefrom. Nothing, however, herein contained shall be construed to extend to any incorporated company, if the contract be for the general benefit of such corporation or company.

Jun -5 1928.

THE UNITED STATES OF AMERICA,
By L. R. FIOCK,
ELEPHANT BUTTE IRRIGATION DISTRICT,
By A. S. ROBERTSON,
President.
EL PASO COUNTY WATER IMPROVEMENT DIST. NO. 1,
By T. D. PORCHER,
President.

Attest: Jun 5 1928
L. E. KUHNLEY,
Secretary,
(Seal)

Attest: May 31 1928.
IDUS T. GILLETT,
Secretary.
(Seal)

Extract of Minutes of a Special Meeting of the Board of Directors of the El Paso County Water Improvement District Number One on May 31, 1928, Held in the General Offices of the District at El Paso, Texas.

Meeting called to order at 10 A.M. May 31, 1928.

Directors present, T. D. Porcher, W. J. Stahmann, Idus T. Gillett, Joe Campbell, Frank P. Frist, Directors absent None.

The board then considered the proposed contract dated May 10, 1928, between the United States of America as the first party and the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1, as the second parties, providing for the granting by the United States to the said districts, of the privilege of constructing operating and maintaining a power plant or plants for the development of hydroelectric energy making use of all facilities, title to which may be in the United States, as a part of the Rio Grande project under the conditions set forth in the said proposed contract.

After due consideration by the board it was moved by Director W. J. Stahmann, that the president be authorized to execute the said proposed contract on behalf of the El Paso County Water Improvement District Number 1. Thereupon Director Idus T. Gillett seconded the motion and the same being put to a vote the motion was passed

(p 179)

Filed: Jan 27 - 1956

United States of America

UNITED STATES
GENERAL ACCOUNTING OFFICE

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting Act, 1921, 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 12.2 (a), I hereby certify that the annexed documents, are

true copies of the official documents now on file in the United States General Accounting Office in the following case:

Elephant Butte Irrigation District

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States General Accounting Office to be affixed this 23rd day

(P.180)

Form No. 1006 (Revised)
Form approved by
Comptroller General U. S.
August 20, 1930

Control

Date Nov. 9 19 37

STATEMENT AND CERTIFICATE OF AWARD

DEPARTMENT OF THE INTERIOR (Department or establishment) | BUREAU OF RECLAMATION (Bureau or office) | EL PASO, TEXAS (Location)

Indexed
Card
Reviewed

METHOD OF OR ABSENCE OF ADVERTISING

(Section 3709 of the Revised Statutes)

Jir-982

1. After advertising in newspapers.
2. (a) After advertising by circular letters sent to ..... dealers.
   (b) And by notices posted in public places.

   (If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2 (a) (b)" or "2 (a)," depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.
4. Without advertising in accordance with Form approved by Acting Secretary September 17, 1937
5. Without advertising, it being impracticable to secure competition because of ..... and Oct. 20, 1937

(Here state circumstances under which the securing of competition was impracticable)

AWARD OF CONTRACT

A. To lowest bidder as to price (Expenditures).
B. To other than the lowest bidder as to price (Expenditures).
C. To highest bidder as to price (Receipts).
D. To other than the highest bidder as to price (Receipts).

CERTIFICATE

I CERTIFY that the foregoing statement is true and correct; that the agreement was made in consequence of No. 4 of the method of or absence of advertising and in accordance with award of contract lettered D, as shown above; that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.

Certificate.

I, Idus T. Gillett, hereby certify that the above and foregoing is a full, true and correct copy and transcript of so much of the minutes of a meeting of the Board of Directors of the El Paso County Water Improvement District Number 1, held on May 31, 1928, as relates to the execution of a contract dated May 10, 1928, between the United States of America as the first party and the Elephant Butte Irrigation District and El Paso County Water Improvement District Number 1, as the second parties, providing for the granting to the said districts of the privilege of constructing, operating and maintaining a power plant or plants for the development of hydro-electric energy making use of all facilities title to which may be in the United States as a part of the Rio Grande project.

Witness my hand and the seal of the El Paso County Water Improvement District #1, this 31st day of May, 1928.

IDUS T. GILLETT,
(Seal) Secretary.

Extract of Minutes of Special Meeting of the Board of Directors of the Elephant Butte Irrigation District on June 4th, 1928, Held in the Temple of Agriculture at Las Cruces, New Mexico.

Meeting called to order at ten A. M. June 4th, 1928.

Directors Present: Robertson, Hernandez, Benvie, Bennett, Mayfield, Hibler, Bowman, Rigney.

Directors absent: Kuhnley.

The board then considered the proposed contract dated May 10, 1928, between the United States of America as the first party and the Elephant Butte Irrigation District and the El Paso County Water Improvement District Number 1, as the second parties, providing for the granting by the United States to the said districts, of the privilege of constructing, operating and maintaining a power plant or plants for the development of hydroelectric energy making use of all facilities, title to which may be in the United States, as a part of the Rio Grande project under the conditions set forth in the said proposed contract.

After due consideration by the board, it was moved by Director Rigney that the President and Secretary be authorized to execute the said proposed contract on behalf of the Elephant Butte Irrigation District. Thereupon Director Mayfield seconded the motion and the same being put to a vote the motion was passed.

Certificate.

I, L. E. Kuhnley, hereby certify that the above and foregoing is a full, true and correct copy and transcript of so much of the minutes of a meeting of the Board of Directors of the Elephant Butte Irrigation District, held on June 4th, 1928, as relates to the execution of a contract dated May 10, 1928, between the United States of America as the first party and the Elephant Butte Irrigation District and El Paso County Water Improvement District Number 1, as the

second parties, providing for the granting to the said districts of the privilege of constructing, operating and maintaining a power plant or plants for the development of hydroelectric energy making use of all facilities title to which may be in the United States as a part of the Rio Grande project.

Witness my hand and the seal of the Elephant Butte Irrigation District, this 5th day of June, 1928.

L. E. KUHNLEY,
Secretary.

Accounting Act, 1921, 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 12.2 (a), I hereby certify that the annexed documents, are

true copies of the official documents now on file in the United States General Accounting Office in the following case:

Elephant Butte Irrigation District

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States General Accounting Office to be affixed this 23rd day of December in the year 1955 at Washington.

By direction of the Comptroller General of the United States,

D-2
GA #1683
A.C.V.

United States General Accounting Office.

UNITED STATES
GENERAL ACCOUNTING OFFICE
Form 78 5-9-55

GPO 863696

(Here state circumstances under which the securing of competition was impracticable)

AWARD OF CONTRACT

A. To lowest bidder as to price (Expenditures).
B. To other than the lowest bidder as to price (Expenditures).
C. To highest bidder as to price (Receipts).
D. To other than the highest bidder as to price (Receipts).

CERTIFICATE

I CERTIFY that the foregoing statement is true and correct; that the agreement was made in consequence of No. 4 of the method of or absence of advertising and in accordance with award of contract lettered D, as shown above; that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.

United States Department of the Interior, Bureau of Reclamation.

Rio Grande Project, New Mexico-Texas.

Roddn.
Thomas.
Symbol 11r-982.
(Received date illegible.)

Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes.

This agreement made this 9th day of November, 1937, under the provisions of the Act of June 17, 1902 (32 Stat. 388) and acts amendatory thereof and supplementary thereto, and especially the statutory provisions (quoted in Article 3 hereof) relating to the Rio Grande project and contained in the Bureau of Reclamation part of the Interior Department Appropriation Act, fiscal year 1938, approved August 9, 1937, (Public No. 249, H. R. 6958, 75th Congress), all said acts being hereinafter comprehensively referred to as the Reclamation Law, by and between the United States of America, acting for this purpose by and through Oscar L. Chapman, Assistant Secretary of the Interior, and the Elephant Butte Irrigation District, an irrigation district duly organized and existing under the laws of the State of New Mexico.

Witnesseth That:

Definitions.

Article 2. As used herein the following abbreviated terms mean the terms set out directly thereafter as follows:

United States—United States of America.

Secretary—Secretary of the Interior.

District—Elephant Butte Irrigation District.

Association—Elephant Butte Water Users' Association.

Contract of June 27, 1906 as amended and supplemented—The following contracts between the United States and the Elephant Butte Water Users' Association and the Elephant Butte Irrigation District:

1. Joint contract with the Elephant Butte Water Users' Association and the El Paso Valley Water Users' Association, dated June 27, 1906.

2. Contract with Association, dated July 6, 1917.

3. Joint contract with Association and District, dated June 15, 1918.

4. Contracts with District, dated October 11, 1919; July 1, 1922; February 21, 1924; July 6, 1928; August 20, 1928; and December 20, 1929.

Power Privilege Agreement—Joint contract between the United States, the District and the El Paso

County Water Improvement District No. 1, dated May 10, 1928.

Storage system—Elephant Butte Dam and Reservoir and appurtenant works and the Caballo Dam and Reservoir and appurtenant works.

Power system—Power plants, transmission lines, etc., constructed for development of power.

Irrigation and Drainage system—All project works except the Storage and power systems.

Explanatory Recitals.

Article 3. Whereas, the Interior Department Appropriation Act, fiscal year 1938, under the caption "Bureau of Reclamation," contains the following provision in the item for the Rio Grande project, New Mexico-Texas:

"Provided, That the Secretary of the Interior is hereby authorized to enter into a contract with the El Paso County Water Improvement District Numbered 1 and the Elephant Butte Irrigation District of New Mexico by which the districts will be relieved of the obligation of making payment of the construction cost chargeable to the development of power of Elephant Butte Dam, in the amount determined as equitable by the Secretary of the Interior in return for the conveyance by the said two districts to the United States of all the districts' right, title, interest, and estate in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy: Provided furth-

er, That in such contracts it shall be stated that the use of the dam, project works, and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: Provided further, That the net earnings of the power plant and system belonging to the United States and any other available revenues shall be applied, until the cost thereof has been met, upon the cost of the power development, including (1) the cost of power facilities, (2) the amount invested as herein authorized, in the cost of Elephant Butte Dam, and (3) the amount invested by the Bureau of Reclamation in Caballo Dam: Provided further, That after the cost of the power development has been met the net earnings of the power plant and system shall be disposed of as Congress may direct."

Article 4. Whereas, the District desires to receive (1) the benefits of the provisions of the Interior Department Appropriation Act hereinbefore quoted and also (2) the benefits of the provisions of other acts of Congress relating to the repayment of charges in return for the conveyance by the District, for itself and the landowners therein, to the United States of all the right, title, interest, and estate of the District and is landowners in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy.

Now, Therefore, in consideration of the covenants herein contained, it is agreed between the parties as follows:

District Relieved of Obligation for Construction Cost Chargeable to Power.

Article 5. The equitable amount of the construction cost of the storage system (exclusive of Caballo Dam and reservoir) chargeable to power development, as determined by the Secretary and accepted by the District, is $4,246,408.39, computed as follows:

Cost of Storage System (exclusive of Caballo Dam and reservoir)		
Elephant Butte Dam and reservoir	$5,219,663.53	
Related features—roads, etc.	26,744.86	
		—$5,246,408.39
Less Direct Appropriation (Non-reimbursable) Act of March 4, 1907 (34 Stat., 1357)		1,000,000.00
Balance chargeable to power development		$4,246,408.39

The United States, pursuant to the provisions of the Interior Department Appropriation Act, fiscal year 1938, hereinbefore quoted, will and hereby does relieve the District of 56.7742 per centum of the amount herein fixed as the equitable amount of the construction cost chargeable to power development, or $2,410,864.39, and will and hereby does reduce the District's obligation for the repayment of its share of the construction cost of the project from $7,920,000, which the District assumed and agreed to pay to the United States under contract of June 27, 1906, as amended and supplemented, to $5,509,135.61.

Operation and Maintenance Cost for Irrigation and Drainage System, Calendar Year 1937, Added to Construction Obligation.

Article 6. The notice issued February 11, 1937, to the District by the Secretary, pursuant to the provisions of the contract of June 27, 1906, as amended and supplemented, announcing the estimated cost of operating and maintaining that portion of the Rio Grande project irrigation and drainage system which is utilized for the benefit of lands within the District for the irrigation season of 1937 (calendar year 1937), and requiring the payment of a reservoir or storage charge for certain lands is hereby rescinded. In lieu thereof, the District's share of the cost of operation and maintenance of the irrigation and drainage system (exclusive of the storage system) for the calendar year 1937, estimated at $170,000 will be added to and shall be payable with the reduced construction obligation fixed in Article 5 hereof. In the event that the District's share of the actual cost of operation and maintenance during the calendar year 1937 as conclusively determined by the Secretary is less than the estimated amount thereof, the excess of estimate over cost will be credited as a reduction of the construction charge installment due and payable by the District to the United States, in the calendar year 1938; in the event that the District's share of the actual cost is greater than the estimated amount, the excess of cost over estimate will be added to the construction charge installment due and payable by the District to the United States in the calendar year 1939.

Interest on Construction Charges Deferred under the Act of April 1, 1932, as Amended and Supplemented Added to the Construction Obligation.

Article 7. Pursuant to the acceptance by the District of the Act of April 1, 1932, (47 Stat., 75), as amended and supplemented, extending the time of payment for all or part of construction charge installments for the years 1930 to and including 1936, the District is obligated to pay the United States interest charges in the amount of $21,850.16. The District agrees to pay such interest charges to the United States as hereinafter provided as a part of the adjusted construction charge obligation.

District Assumes Payment of the Adjusted Construction Obligation.

Article 8. The District assumes and agrees to pay the adjusted construction charge obligation of $5,700,985.77, being the total of the items set forth in Articles 5, 6, and 7, above. It is understood and agreed that the District has paid to the United States construction charges aggregating $1,762,473.85, and will, on or before the execution by it of this contract, pay, with accrued penalties, the 1936 construction-charge installment of $154,800, due September 1, 1937, such payment to be made either by cash or by cash and credits. The aggregate amount of $1,917,273.85 will be applied to the payment of the adjusted construction obligation of $5,700,985.77, and the District agrees to pay the resulting balance of the construction charge obligation, viz., $3,783,711.92 in fifty equal successive semi-annual installments, on March 1, and September 1 of each year, commencing with the first pay-

ment due and payable March 1, 1938, and ending with the last payment due and payable on September 1, 1962, the installments for 1938 and 1939, however, being subject to possible adjustments as provided in Article 6 hereof.

Segregation of Project Features for Purposes of Operation and Maintenance—1937 and thereafter.

Article 9. The United States will continue the operation and maintenance of the project until otherwise provided. Beginning with the calendar year 1937, the operation and maintenance of the project will be segregated as (a) operation and maintenance of the storage system and power system, and (b) operation and maintenance of the remainder of the project, hereinafter referred to as the irrigation and drainage system.

Operation and Maintenance of Storage System for Delivery of Irrigation Water.

Article 10. For the calendar year 1937, and thereafter during the period of the repayment of the remaining construction obligation of the District as fixed in Article 8 hereof, the District will pay to the United States, in lieu of regular operation and maintenance charges for the storage system, and in lieu of the storage water rental charges heretofore collected for lands not designated for payment of construction charges, a reservoir service charge of ten cents (10 cents) per acre-foot for each and every acre-foot of water, reasonably necessary for irrigation, made available for the lands of the District at the turnouts of the Elephant Butte dam, until the

Caballo Dam is completed, thenceforth at the turnouts of the Caballo dam. Because of the requirement for the payment of the reservoir service charge as herein provided, the provisions of the contract between the District and the United States, and of the notice of February 11, 1937, given by the First Assistant Secretary to the District, requiring the payment of an annual storage water rental charge for the calendar year 1937 of fifty cents (50 cents) per acre for the total area within the District of lands not designated for commencing payment of construction charges shall be inoperative for the calendar year 1937, and such annual storage rental charges shall not be collected by the United States for subsequent years.

The officer of the Bureau of Reclamation in charge of the Rio Grande project will render on or before October 15, 1937, and on or before October 15 of each year thereafter, a statement to the District of the number of acre-feet turned out of the reservoir for the lands within the District and the amount due hereunder for the then preceding twelve months, and the District will pay the amount stated in such notice on or before the first day of March following rendition of the statement. Payments for such reservoir service shall continue for each year during the period of repayment of the remaining construction obligation of the District as provided in Article 8 hereof. For the year immediately following the year for which the last installment of the adjusted construction obligation is payable, and for each succeeding year thereafter, the Secretary will make an equitable determination of the District's share of the estimated cost of operating and maintaining the storage system for ir-

rigation purposes and the amount so determined annually shall be included in and combined with the annual estimate of operation and maintenance of the irrigation and drainage system and shall be due and payable at the same time and in like manner as provided in Article 11 hereof.

Operation and Maintenance for 1938 and Thereafter Payable in Advance.

Article 11. The period during which the United States continues after January 1, 1938, to operate and maintain the Rio Grande project for and within the District, will hereinafter be referred to as the Government maintenance period. The District will, during the Government maintenance period, pay to the United States in advance the estimated cost of operating and maintaining that portion of the project, other than the storage and power systems, which is utilized for the benefit of lands within the District. Such estimated cost for the calendar year 1938 is $175,000, of which the amount of $32,620 shall be due and payable on or before December 15, 1937 and the amount of $81,700 thereof shall be due and payable on or before February 15, 1938, and the remainder thereof in the amount of $60,680 shall be due and payable on or before July 15, 1938. Each year thereafter during the Government maintenance period the annual estimated cost shall become due and payable in the following manner: On or before September 1, 1938, and on or before September 1 of each subsequent calendar year during the Government maintenance period, the Secretary will notify the District of the amount of the District's proportion of the estimated operation and maintenance cost (including all neces-

sary equipment, materials and supplies, proper overhead and general charges) in operating and maintaining the project works, other than the storage and power systems, during the calendar year next succeeding the year in which the notice is given. Such notice will state the District's share of such estimated cost (a) for the first two months of the calendar year next succeeding, (b) for the five next succeeding months, and (c) for the remaining five months of the calendar year for which notice is given. The amount stated for the first two months of the calendar year shall be due and payable on or before December 15 of the year in which the notice is given; the amount stated for the next succeeding five months shall be due and payable on or before February 15 of the calendar year next succeeding the year in which the notice is given; and the amount stated for the last five months of the calendar year shall be due and payable on or before July 15 of the calendar year next succeeding the year in which the notice is given. As soon as practicable after the close of the calendar year for which notice of the estimated cost of operation and maintenance is given, the District will be furnished a statement of actual cost of such operation and maintenance and the District's proportionate share thereof, and any excess of payment upon the basis of estimated costs over actual costs shall be credited upon the payment due and payable by the District on July 15 next succeeding such calendar year. If in the opinion of the Secretary the estimate of such operation and maintenance cost appears to be insufficient to meet the actual cost thereof he shall give notice of such threatened deficiency and his estimate of the amount thereof and the District's share thereof; and the District shall pay to the United States

its proportion of the amount of such deficiency within 15 days from the date of such notice. Should the District fail to make payment of any operation and maintenance charges at the time and in the manner above provided, the United States will be under no further obligation to deliver water to any land within the District, beyond funds available therefor.

District to Receive Credit for Water Rental Collections from Hudspeth County Conservation and Reclamation District.

Article 12. Pursuant to subsection J of section 4 of the Act of December 5, 1924 (43 Stat., 703), collections of water rental charges under the contract between the United States and the Hudspeth County Conservation and Reclamation District No. 1, dated December 1, 1924, as heretofore or hereafter amended and supplemented, during the calendar year 1937, and annually thereafter, will be credited to the District's obligations as follows: The District's pro rate share thereof as conclusively determined by the Secretary will be segregated by construction component and operation and maintenance component as also conclusively determined by the Secretary. The construction component will be credited to the payment of the District's construction charge installment next due and payable after the collection of such water rental charge is made from the Hudspeth District, and the operation component will be credited to the payment of the District's operation and maintenance payment next due and payable after the collection of such water rental charge is made from the Hudspeth District.

Irrigation use of Project Water Supply is Primary Use.

Article 13. In carrying out the provisions of this contract the United States shall operate the Elephant Butte Dam and other power works connected therewith, including the project water supply for power purposes so as not to deplete or interfere with the use thereof for irrigation purposes. The storage works will be operated primarily for irrigation purposes and water is not to be released from Elephant Butte reservoir for the development of power except to the extent that such water may be retained in the Caballo reservoir until needed and released for irrigation purposes. Water thus intercepted and stored in the Caballo reservoir shall not be released therefrom in excess of releases estimated to be reasonably necessary to meet the requirements for irrigation purposes, for treaty allowances to the Republic of Mexico as provided in the treaty proclaimed January 16, 1907, and for flood control needs. Nothing in this contract shall ever be construed or interpreted so as to alter, diminish, or impair the right of project land owners to such water rights as may be or become appurtenant to their lands under the Federal Reclamation Laws and under the original contracts entered into between the original water users' association on this project and the United States.

Designation of Areas Subject to Construction Charges, No Longer Necessary.

Article 14. Because of the change in the relations between the District and the United States as herein provided regarding the payment of the adjusted

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STATEMENT AND CERTIFICATE OF AWARD

No. Ilr-983 (Contract)

Date October 1, 1936

DEPARTMENT OF THE INTERIOR (Department) | BUREAU OF RECLAMATION (Bureau or office) | EL PASO, TEXAS (Location)

METHOD OF OR ABSENCE OF ADVERTISING

(Section 3709 of the Revised Statutes)

1. After advertising in newspapers.
2. (a) After advertising by circular letters sent to _____ dealers.
   (b) And by notices posted in public places.

(If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2 (a) (b)" or "2 (a)," depending on whether or not notices were posted.)

3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.
4. Without advertising in accordance with _____
5. Without advertising, it being impracticable to secure competition because of the contractor being the only person with whom the contract could have been made.

(Here state circumstances under which the securing of competition was impracticable)

AWARD OF CONTRACT

A. To lowest bidder as to price (Expenditures).
B. To other than the lowest bidder as to price (Expenditures).
C. To highest bidder as to price (Receipts).
D. To other than the highest bidder as to price (Receipts).

CERTIFICATE

I CERTIFY that the foregoing statement is true and correct; that the agreement was made in consequence of No. 5 of the method of or absence of advertising ~~and in accordance with award of contract lettered _____~~, as shown above; that the total number of bids received is _____; and that where lower bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; that the services covered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.

construction charge obligation, the parties hereto hereby rescind the provisions of Article 7 of the contract of June 15, 1918, among the district, the Elephant Butte Water Users Association and the United States, and similar provisions of later contracts between the District and the United States so far as said provisions require that, from time to time, as the Secretary may determine that specified areas of irrigable district lands, not necessarily contiguous, should commence the payment of the construction charge of the irrigation works, he shall render a statement to such effect to the district, designating the areas of said district lands, stating the amount of the construction charge payable for such designated areas.

Additional Construction Work.

Article 15. The United States will continue with the construction of the irrigation and drainage features of the project, contingent upon appropriations therefor being made available by Congress, to the extent that the District's adjusted construction charge obligation will permit. It is understood that, if for any reason the total construction cost chargeable to District lands is less than the District's adjusted construction obligation, the District will be relieved of the payment of such excess through a reduction to the extent of such excess of the construction charge installments payable at the end of the repayment period fixed herein, such reductions being applicable on said construction charge installments in the inverse order of due dates.

United States to Perform Work with Contributed Funds.

Article 16. Pursuant to the Act of Congress of March 4, 1921 (41 Stat., 1367, 1404) the United States during the Government maintenance period will perform with funds contributed by the District such betterment or additional maintenance work on the project as may be deemed necessary by the District and approved by the Secretary. Before undertaking any such work the United States will be furnished with the necessary contributed funds, in one or more installments as may be agreed upon, accompanied by a certified copy of a resolution of the board of directors of the District, setting forth the nature of the work desired and authorizing its performance with such contributed funds. Upon the completion of the work so authorized, the District will be furnished with a statement of the cost thereof, and any unexpended balance of such contributed funds will be refunded to the District or applied otherwise as the District may direct.

Cancellation of Power Privilege Agreement.

Article 17. The District and the United States hereby rescind that certain Power Privilege Agreement described in Article 2 hereof.

District Conveys Power Interests.

Article 18. The District for itself, and its water users and land owners and for its and their successors and assigns, does hereby convey, and grant to the United States all of its and their claims of right,

title, interest and estate, present and prospective in the use of the Elephant Butte Dam and other project works, including the project water supply, for the development of hydroelectric energy by the United States: Provided that the use of said dam, project works and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: and Provided further, That the net earnings of the power plant and system belonging to the United States and any other available revenues accruing to the United States by reason of Government ownership of the power plant and system shall be applied in accordance with the provisions of the item in the Interior Department Appropriation Act, fiscal year 1938, as set out in Article 3 hereof.

The validity of the conveyance to the United States as contained in this Article, is of the essence of this agreement. A contract similar to this (hereinafter referred to as the El Paso contract) is being made coincidently with the El Paso County Water Improvement District No. 1, containing the portion of the Rio Grande Federal Reclamation project that lies in the State of Texas, and the El Paso contract contains an article similar to Article 18 hereof. Should the conveyance to the United States in Article 18 hereof, or in the similar article of the El Paso contract, ever be held invalid or ineffective in whole or in part, as to either district, or as to any water user or landowner or group of landowners in either or both districts, the Secretary may, by notice to the District, terminate this agreement, whereupon the rights and obligations of the parties hereto shall be reinstated, so far as practicable, as if this agreement had not been made. Any landowner of the district, or any

holder of a mortgage or lien upon land in the district, who does not object to the confirmation of this contract by the Courts shall be estopped thereafter to question the validity of this conveyance. Likewise any landowner of the district, or any holder of a mortgage or lien upon land in the district, who accepts the benefits of this agreement in the reduced construction installments permitted hereby, shall be deemed conclusively to have accepted this agreement and to have acceded to the conveyance herein made, so far as his land or interest is concerned.

Agreed Charges a General Obligation of the District.

Article 19. The District is obligated to pay to the United States the full amounts herein agreed upon according to the terms stated, notwithstanding any individual default in the payment of any assessments, tolls or charges levied by the District to secure funds to meet charges due to the United States.

District to Use All Powers to Collect.

Article 20. All construction and operation and maintenance charges due to the United States hereunder shall be paid as required by this contract to the proper fiscal officer of the United States. The amounts due the United States shall be a first charge upon the collections of said district. The District agrees that it will cause to be levied and collected all necessary assessments, including a sum to cover (1) any individual collection delinquency for past years and (2) estimated individual collection delinquency for the year for which assessments are being levied, and will use all powers and resources of the District,

including the taxing power of the District and the power to withhold delivery of water, to collect and pay to the United States all charges provided for in this contract in full on or before the day that the same become due.

No Water to be Delivered Without Payment.

Article 21. Pursuant to the provisions of Section 6 of the Act of Congress of August 13, 1914 (38 Stat., 686) no water shall be delivered to or for any tract of land receiving water through the project works, the owner or holder of which shall be in arrears for more than one (1) year for the payment of any charge for operation and maintenance, or any annual construction charge, and penalties, or any assessments levied by the District for the purpose of paying construction or operation and maintenance charges, or who after the beginning of the year 1938 shall fail to pay in advance the annual operation and maintenance charges.

Water Users Accepting Benefits of Contract Estopped.

Article 22. It is understood that the consideration hereof running to the District is the benefit conferred under the provisions of the act set out in Article 3 hereof and of the acts of December 5, 1924 and May 25, 1926, and that any landowner or water user of the District who accepts any such benefits under the terms hereof shall be estopped to disclaim any part of the obligation of the district hereunder. If (a) in any Court action at the instance of the district or of any of its officers, land owners of water users, this contract or any of its provisions are held to be void,

so that in the opinion of the Secretary the contract becomes substantially incapable of performance, or if (b) in any Court action at the instance of El Paso County Water Improvement District No. 1 or of any of its officers, land owners or water users, the El Paso contract, as defined in Article 18 hereof, or any of its provisions are held to be void, so that in the opinion of the Secretary that contract becomes substantially incapable of performance, the district and its land owners or water users shall revert to the terms and conditions of the contract of June 27, 1906, as amended and supplemented with like effect as though this contract had never been executed.

Payment of Interest Charges.

Article 23. Upon every sum of money required to be paid to the United States by this contract and not paid when due, interest at the rate of six (6) per centum shall be added from the due date until the date of payment, and the district hereby agrees to pay such interest.

Secretary Arbiter of Questions of Fact.

Article 24. Whenever in this agreement an estimate or determination of fact is required or any question of fact is left undetermined by the provisions hereof, the Secretary shall make any and all such estimates and determinations of fact and decisions upon any and all questions of fact which may arise hereunder, and the Secretary's estimate, determination or decision thereof or thereon shall be binding and conclusive upon the parties to this agreement.

Access to Books and Records.

Article 25. The proper officers or agents of the District shall have full and free access at all reasonable times to the project account books and official records of the United States relating to the construction, acquisition, care, operation and maintenance of the irrigation and drainage works, with the right at any time during office hours to make copies of, or from, the same or any of them, and the proper representatives of the United States shall have similar rights in respect to the accounts books and records of the District.

Election and Confirmation.

Article 26. The execution of this contract shall be authroized by the qualified electors of the district at an election held for that purpose and thereafter the District shall prosecute to final decree, proceedings in a Court of competent jurisdiction for the confirmation of this contract. The United States shall not be required to proceed under the terms of this contract until (1) a confirmatory final judgment in such proceeding shall have been finally rendered, and (2) the El Paso contract shall have been authorized at an election and confirmed by the Courts of the State of Texas. The District shall furnish the United States certified copies of all proceedings relating to said election and confirmation proceedings.

Reversion to Contract of June 27, 1906 as Amended and Supplemented on Failure of This Contract.

Article 27. In the event of a failure of the authorization of this contract at an election called for that purpose or in confirmation proceedings subsequently

brought, this contract shall be void and of no effect and the parties hereto shall revert to the contract of June 27, 1906 as amended and supplemented with like effect as though this contract had never been executed.

This contract is also not to become effective for any purpose unless and until the El Paso contract, as defined in Article 18 hereof, is voted and confirmed and becomes effective.

Provisions of the Contracts as Amended and Supplemented Shall Remain Effective.

Article 28. This agreement is supplemental to the contract of June 27, 1906 as amended and supplemented, and it is agreed that the terms and conditions thereof shall remain unaffected by the provisions hereof, except as they are modified by said provisions.

Remedies Saved to the United States.

Article 29. The mention of any remedies of the United States herein or in such contract of June 27, 1906 as amended and supplemented, for breach of any of said contracts shall not be understood to exclude the United States from any other remedy which it may have, and it is further understood that all rights of action for breach of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Officials Not to Benefit.

Article 30. No member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or any benefit to arise therefrom. Nothing, however, herein contained, shall be construed to extend to any incorporated company, if the contract be for the general benefit of such corporation or company.

In Witness Whereof, the parties have hereto subscribed their names the day and year first above written.

THE UNITED STATES OF AMERICA,
By OSCAR L. CHAPMAN,
Assistant Secretary of the Interior,

ELEPHANT BUTTE IRRIGATION DISTRICT,
By ARTHUR STARR,
President.

Attest:
JOSE R. LUCERO,
Secretary.
(Seal)

Excerpt From Minutes of Meeting Held by the Board of Directors of the Elephant Butte Irrigation District, Tuesday, November 9, 1937.

"The Board then proceeded to canvass the returns of the election held November 6, 1937 on the new construction contract. The results showed that there

were 450 for the new contract and 4 against the new contract. The vote by precincts was as follows:

Precinct No.	For	Against	Total
1	42	2	44
2	49	1	50
3	42	0	42
4	66	1	67
5	102	0	102
6	28	0	28
7	32	0	32
8	31	0	31
9	58	0	58
	450	4	454

It was moved by Wright, seconded by Lewis, that the Board declare the contract advertised in the election of November 6, carried, and the president and secretary be authorized to sign the contract provided for in the election between the District and the United States. Motion carried unanimously."

This is to certify that the foregoing is a true and correct copy of an excerpt from the minutes of the meeting held by the Board of Directors of the Elephant Butte District, Tuesday, November 9, 1937.

JOSE R. LUCERO,
(Jose R. Lucero),
Secretary, Elephant Butte
Irrigation District.

(Seal)

Nov. 22 '37. 59922.

AWARD OF CONTRACT

A. To lowest bidder as to price (Expenditures).
B. To other than the lowest bidder as to price (Expenditures).
C. To highest bidder as to price (Receipts).
D. To other than the highest bidder as to price (Receipts).

CERTIFICATE

I CERTIFY that the foregoing statement is true and correct; that the agreement was made in consequence of No. 5 of the method of or absence of advertising ~~and in accordance with award of contract lettered ----------~~; as shown above; ~~(the total number of bids received is ----------~~; and that where lower bids (expenditure contracts) of higher bids ~~(receipt contracts) as to price were received a statement of reasons for their rejection, together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; and that the services or articles agreed to be performed or delivered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.~~

O. C. [illegible]
1940

O. C. Dedar, Secretary
(Title)

(Signature of contracting officer)

7-23

This statement and certificate will be used to support all agreements, both formal contracts and less formal agreements of whatever character, involving the expenditure or receipt of public funds. It must be executed and signed by the contracting officer (unless the award is made by or is subject to approval by an officer other than the contracting officer, when execution and signature may be made by such officer).

P. A. AGREEMENT relating OFFICE & CODE

United States Department of the Interior, Bureau of Reclamation, Rio Grande Project.

Symbol IIr-982

Contract Between the United States and the Elephant Butte Irrigation District Adjusting Period for Payment of Construction Charges.

This Agreement, made this first day of October, 1939, under the provisions of the Act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof and supplementary thereto, and particularly the Reclamation Project Act of 1939, approved August 4, 1939 (Public No. 260—76th Congress, Chapter 418—1st Session), together known as the Reclamation Law, by and between the United States of America, hereinafter styled the United States, acting for this purpose by and through A. J. Wirtz, Under Secretary of the Interior, and the Elephant Butte Irrigation District, hereinafter styled the District, an irrigation district duly organized and existing under the laws of the State of New Mexico.

Witnesseth That,

Explanatory Recitals.

2. Whereas, the United States and the District have heretofore entered into certain contracts, including that certain contract dated November 9, 1937, and

3. Whereas, the District desires to avail itself of the benefits afforded by Section 3 of the said Reclamation Project Act of 1939 and for that purpose the United States and the District are willing to

amend the said contract of November 9, 1937, so as to provide that the District construction charges remaining unaccrued after the accrual of the annual installment of such charges for the year 1938, which became due one-half thereof on March 1, 1939, and one-half thereof on September 1, 1939, shall be spread in definite annual installments on the basis of a longer definite period not exceeding forty years, (exclusive of 1931 and subsequent years to the extent of moratoria or deferments of construction charges due and payable for such years effected pursuant to Acts of Congress) from the date viz., March 1, 1923, when the first installment of such construction charges became due and payable under the original obligation to pay said construction charges, and

4. Whereas, the Secretary of the Interior has determined that such amendment is both practicable and in keeping with the general purpose of the said Reclamation Project Act of 1939 and that the unexpired part of the longer period for payment of construction charges by the District as hereinafter provided for does not exceed double the number of remaining years as of the effective date of this agreement, in which installments of said construction charges would become due and payable under the said contract of November 9, 1937; and

5. Whereas, of the District's construction charge obligation of three million seven hundred eighty-three thousand seven hundred eleven and 92/100 dollars ($3,783,711.92) as set forth in Article 8 of the contract of November 9, 1937 there remains unaccrued at the date of this agreement three million four hundred eighty one thousand ten and 96/100 dollars ($3,481,010.96),

6. Now, Therefore, in consideration of the premises and the covenants herein contained it is agreed between the parties as follows:

7. All construction charge installments or parts of installments now due and payable by the District shall be paid in accordance with the terms of existing contracts.

8. The period for payment to the United States by the District of the said remaining unaccrued balance of the District's construction charge obligation to the United States in the sum of three million four hundred eighty-one thousand ten and 96/100 dollars ($3,481,010.96) shall be and the same hereby is extended so that the last of the semiannual installments thereof as provided in Section 9 of this agreement shall become due to the United States from the District on September 1, 1967.

9. The District hereby agrees to pay to the United States the balance of the District's construction charge obligation to the United States heretofore assumed by the District under its existing contracts with the United States, which said unaccrued balance is the sum of three million four hundred eighty-one thousand ten and 96/100 dollars ($3,481,010.96), in fifty-six successive semiannual installments of sixty-two thousand one hundred sixty and 91/100 dollars ($62,160.91) each, on March 1 and September 1 of each year, commencing with the first payment to become due and payable on March 1, 1940, and ending with the last payment to become due and payable on September 1, 1967. The installments, as above stated, are subject to reduction by credits under Article 13

of the contract of February 2, 1939, between the parties hereto, no credits having been heretofore allowed to the District under said Article 13.

Existing Contracts Not Affected.

10. Existing contracts between the United States and the District, except as modified hereby, shall remain in full force and effect and unaltered by the provisions of this agreement.

Officials not to Benefit.

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,
By A. J. WIRTZ, (BCK, DMH),
Under Secretary of the Interior.

ELEPHANT BUTTE IRRIGATION DISTRICT,
By ARTHUR STARR,
President.

(Seal)

Attest:
JOSE R. LUCERO,
Secretary of the Elephant Butte Irrigation District.

Excerpt From the Minutes of the Special Meeting of the Board of Directors of the Elephant Butte Irrigation District, Held December 11, 1939.

"The matter of the Contract, dated October 1, 1939, between the Elephant Butte Irrigation District and the United States, to provide for a further extension of construction repayment for a period of five additional years, was then brought up for consideration of the Board.

It was moved by Higgins and seconded by Lowry, that the contract be approved. Motion carried unanimously."

This is to certify that the above is a true copy of the minutes of the special meeting of the Board of Directors of the Elephant Butte Irrigation District, held December 11, 1939.

(Seal)

Attest:
JOSE R. LUCERO,
(Jose R. Lucero),
Secretary Elephant Butte
Irrigation District.

CLERK'S CERTIFICATE.

I, MAXEY HART, Clerk of the United States District Court in and for the Western District of Texas do hereby certify that the foregoing on 170 pages, is a true and correct transcript of proceedings had and orders entered, as therein stated, in Civil Action No. 1683, styled: Ronald Miller, et al. versus Robert W. Jennings, et al., as the same appear on file and of record in this office.

I further certify that said transcript of record includes only such pleadings, and orders as are specified in the Designations filed herein.

Witness my official signature and the seal of said District Court at the City of El Paso, Texas, this the 29th day of May, 1956.

MAXEY HART,
Clerk,
By PAULINE G. SILVEUS,
(Pauline G. Silveus),
Deputy.

(Seal)

FILED
JUL 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1153~~ 253

RONALD MILLER, ET AL,
Petitioners,

v.

ROBERT W. JENNINGS, ET AL,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

THEODORE ANDRESS
El Paso National Bank Building
El Paso, Texas
J. A. RAUHUT
W. MORGAN HUNTER
Brown Building
Austin, Texas
Attorneys for Petitioners

Of Counsel:
Andress, Lipscomb, Peticolas & Fisk
El Paso, Texas
Powell, Rauhut, McGinnis & Reavley
Austin, Texas
July, 1957

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

May It Please the Court:

Petitioners Ronald Miller and others would respectfully show the Court the following:

A. Opinion Below

The opinion of the Court of Appeals, one judge dissenting, is reported in 243 F. 2d 157, and in the appendix to this petition, beginning at Page A-17 hereof.

B. Statement of Jurisdiction

The judgment sought to be reviewed was entered April 12, 1957. No rehearing has been sought. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U. S. C. Section 1254(1).

C. Questions Presented

1. Plaintiffs seek a declaratory judgment and injunction to determine and protect their rights to the use of the water of a river. Plaintiffs seek to join the United States as a party defendant under a statutory consent to joinder in "any suit" for the adjudication or administration of rights to the use of water of a river system or other source. The Court of Appeals held, however, that the statutory phrase "any suit for the adjudication of water rights" is a phrase of art which means "only a suit" so framed as to bring personally before the Court all persons who have rights to the use of the waters of the river.

The first question presented then is this: Must the statutory consent to joinder of the United States in "any suit" be construed so finely as to deny consent where the controversy does not involve all the water users on the river?

2. All the waters in controversy are physically possessed and controlled by the defendant Reclamation officials whom plaintiffs seek to enjoin. Several thousands of upstream landowners, whose lands are served by the facilities of the Reclamation Project,

have interests adverse to plaintiffs in the water controlled by such Reclamation officials. Plaintiffs seek to join such adverse claimants by representation in a class action. The Court of Appeals held that such attempted joinder was ineffective and that each of the thousands of adverse claimants must be personally served with process.

Thus is the second question presented: When the judgment sought will effectively dispose of the property is controversy, and the claimants thereto are too numerous to bring them all personally before the court, may a Federal Court resolve the controversy in a class action?

D. Statute Involved

The statute involved (herein called the "Consent Statute") is Section 208 of the Act of July 10, 1952, 62 STAT. 560, 43 U.S.C.A. Section 666, reading as follows:

> "(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgment, orders, and decrees of the court

having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

E. Statement of the Case

The Rio Grande Federal Reclamation Project is owned by the United States Government and is operated by officials of the Bureau of Reclamation for the purposes of impounding and distributing, primarily for irrigation, the waters of the upper Rio Grande River. The waters are impounded by Elephant Butte Dam in New Mexico, about 125 miles upstream from the City of El Paso, and are distributed through a series of ditches. Seepage and return flow waters are used and sometimes reused. The Project serves an area extending from Elephant Butte Dam nearly to Fort Quitman, Texas, about 85 miles downstream from El Paso. Substantially all the irrigable lands within this area lie within the confines of three irrigation districts: The farthest upstream is Elephant Butte Irrigation District of New Mexico, lying wholly in New Mexico; the farthest downstream of the district is the

Hudspeth County Conservation and Reclamation District No. 1, within Hudspeth County, Texas; between these is El Paso County Water Improvement District No. 1, within El Paso County, Texas.

During recent years the watershed of the upper Rio Grande has been afflicted with a severe drouth. Beginning in 1951, as a "conservation" measure, the Reclamation officials cut off the flow of water to the landowners of Hudspeth District, to their great distress and loss, and diverted to landowners within Elephant Butte and El Paso Districts (herein called "Project" Districts), and to a Federal prison farm in El Paso County, the waters which had formerly been used by the Hudspeth farmers.

The Hudspeth farmers brought suit in 1952 against the Reclamation officials for a determination of their rights and for injunction against further interference. However, in *Hudspeth County C. & R. District No. 1 v. Robbins*, 213 F. 2d 425 (CA 5, 1954), cert. denied, 348 U.S. 833, the 1952 action was dismissed for lack of jurisdiction. The Court of Appeals there held the United States to be an indispendable party, concluding, in effect, that *United States v. Lee*, 106 U.S. 196; *Ickes v. Fox*, 300 U.S. 82, and *Land v. Dollar*, 330 U.S. 731, had been overruled by *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682.

Thereupon this action was commenced by the Hudspeth District and five individual landowners as representatives of all the landowners of Hudspeth District. Defendants are (a) the Regional Director of the Reclamation Bureau and the Manager of the Rio Grande Project; (b) eleven individual up-

stream landowners, all of whom are sued individually and as representatives of upstream landowners whose interests are adverse to plaintiffs in the waters of the Rio Grande controlled by the defendant Reclamation officials; (c) El Paso District and its manager; and (d) the United States Government.

Plaintiffs seek a judicial determination of the rights of the Hudspeth landowners vis-a-vis those of the upstream private landowners and of the Government to the use of the waters of the Rio Grande River between Elephant Butte Dam and Fort Quitman. Plaintiffs pray for declaratory judgment and for injunction restraining interference with plaintiffs' vested water rights by defendant Reclamation officials.

As authority for joining the United States Government as a party defendant, plaintiffs rely upon the Consent Statute above quoted. The District Court and the Court of Appeals held however, that the Consent Statute should be so construed as to grant no consent to this action, and dismissed the complaint for lack of jurisdiction.

F. Jurisdiction of United States District Court

This action was commenced in the state court and was removed to the United States District Court pursuant to 28 U.S.C. Section 1442(a)(3).

G. Reasons for Allowance of the Writ

In countless thousands of streams throughout the arid West, the Federal Government claims, through

its many agencies and activities, some species of right or interest in the water. This case presents for decision the question of whether the Congress has, by the broadest of language, succeeded in conferring upon the citizens of this country the effective power to obtain judicial determination of their rights to the use of water where conflicting federal claims may be involved.

The language of the Consent Statute is of the broadest: It unequivocally grants consent to join the United States as a defendant in **"any suit"** for the adjudication (or administration) of water rights.

The statute imposes no conditions as to parties except that the United States be a necessary party. To the unsophisticated eye, seeking only the meaning set forth in the words of the statute, the statute very plainly grants consent to join the United States in **any suit** wherein is sought a judgment which will determine water rights or control the distribution of water thereunder.

The Court of Appeals held, however, that the words, "any suit" do not mean "any suit" but means "only a suit" so framed as to bring personally before the Court all the users on the stream—an impossible test to meet for drouth-stricken farmers on a river flowing through three states, the waters of which are used by many thousands of persons in each state.

Although the scope of the consent which the Court of Appeals would recognize is not defined, it is clear that the Court of Appeals would deny consent (a)

in any controversy not involving all water users on the stream, and (b) in any controversy wherein the parties interested are so numerous as to render it impractical to bring them all before the court. In short the Court of Appeals would limit the Consent Statute to general controversies involving all water rights on very short or slightly utilized streams.

This holding of the Court of Appeals is squarely contrary to the decisions of this Court in *United States v. Aetna Casualty & Surety Co.*, 388 U.S. 336; *United States v. Yellow Cab Co.*, 340 U.S. 543; and *Indian Towing Company v. United States*, 350 U.S. 61, wherein this Court held that consent statutes should be liberally construed so as to effectuate their purpose:

> "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." 340 U.S. 554; 338 U.S. 383.

As authority for its conclusion that the statutory consent extends only to cases so framed that all the water users on the stream be necessary parties, the Court of Appeals relied upon an excerpt from the opinion of the Court of Appeals for the Ninth Circuit in *People of the State of California v. United States*, 235 F. 2d 647, 663. That case, however, did not involve construction of the Consent Statute, and the actual decision of the Ninth Circuit is in clear conflict with the decision of the Fifth Circuit in the case at bar.

In the California case, the United States brought suit to determine and protect, as against all adverse claimants, its rights to the use of the waters of the Santa Margarita River, a coastal stream which drains a watershed within two counties in California. All adverse claimants to the waters of the stream were joined as parties, and the trial court entered a Pre-Trial order dispensing with the filing of cross pleadings but achieving the same effect. 108 F. Supp. at 75. On motion by the Government a separate trial was then had as to Santa Margarita Water Company, the weakest of the adverse claimants, and the State of California. Thereupon, the district court entered judgment in favor of the Government and against Santa Margarita and the State in "sweeping terms." Specifically it held (a) that the United States had perfected prescriptive title as against all the world to its previous military use of waters of the river, and (b) that there were no surplus waters available for appropriation, under the laws of California, from the Santa Margarita River system.

This judgment was reversed by the Court of Appeals for the Ninth Circuit. The Court of Appeals cited the Consent Statute (n. 4, 235 F. 2d at 653) for the proposition that the district court had jurisdiction to adjudicate the rights of the private users as against the Government on their counter claims. The Court of Appeals then indicated (at 654) that the severance for separate trial of the Government's case against one adverse claimant,

if adequately limited, would have been perfectly proper:

> "The Government apparently desired to try Santa Margarita because it was obviously in the weakest position of any prospective user of the stream. This was, of course, perfectly proper, and this court has affirmed the trial judge in the exercise of his discretion. But no license was accorded thereby to enter judgment in such sweeping terms."

But the Court went on to condemn (at 663-664) and to describe as "somewhat shocking" the trial court's judgment that the United States had perfected a prescriptive right, not only as against the parties to the separate trial, but as against all the world:

> "Besides the damage to Santa Margarita * * *, the rights of others interested in the flow of the stream were prejudged before they had been tried, by sweeping declarations of the judgment in favor of the contentions of agents and attorneys for the Government. This was an abuse of discretion."

That is, on the trial of the Government's severed case against two adverse claimants, the trial court entered judgment for the Government in such "sweeping terms" as to prejudge the cases against the Government of other adverse claimants to the water of the stream. This the Court of Appeals for the Ninth Circuit held to be improper.

Compare now the case of the Rio Grande. At the same time that it has zealously resisted the attempts

by the Hudspeth farmers to obtain judicial determination of their water rights, the United States Government has joined with the El Paso District in bringing suit against a single adverse claimant—the City of El Paso—to the use of the waters of the upper Rio Grande in Texas. *El Paso District together with the United States v. City of El Paso*, 133 F. Supp. 894, affirmed by Fifth Circuit, F. 2d , petition for certiorari pending as No. 1096 of 1956 October Term (filed June 1957). In this suit the Government secured a sweeping pronouncement of infinitely greater scope than that criticized in the California case, to-wit, **that by the Rio Grande Compact of 1939, all the Texas share of the waters of the upper Rio Grande were "definitely committed to the service of the Rio Grande Project [i. e., irrigators within El Paso County.]"** Neither the Hudspeth farmers nor any other Texas water users nor the State of Texas were parties to the case. The appeal from this judgment of the same trial court was heard on the same day as the case at bar by the same panel of the Court of Appeals for the Fifth Circuit. So far from requiring hearing on the merits for all claimants to the rights to use these waters in controversy, the Court of Appeals for the Fifth Circuit simultaneously (a) affirmed this sweeping seizure for the Government Project of all the Texas share of the waters of the upper Rio Grande (F. 2d), and (b) refused to let the Hudspeth farmers, or any other adverse claimants whom the Government does not of its own volition choose to sue, **ever** be heard under **any** docket number to challenge the seizure.

Petitioners submit that the Fifth Circuit has in these two cases **approved** precisely what the Court of Appeals for the Ninth Circuit **condemned.** *California v. United States*, so far from justifying the judgment below, presents a square conflict in decision which should be resolved by the Supreme Court of the United States.

As a second and overlapping ground for its decision that the statutory consent does not extend to the case at bar, the Court of Appeals holds that this is not a suit for adjudication of water rights because the adverse claimants to the waters in controversy are not all personally joined as parties defendant.

All the waters in controversy are in the physical possession and control of the defendant Reclamation officials. The injunction which plaintiffs seek against such officials would reduce the quantity of water available to satisfy adverse claims upstream. The Court of Appeals cites Texas cases which hold that, because such an injunction would affect property in which they are interested, the adverse claimants are necessary parties to the injunction suit. Plaintiffs did join all such adverse claimants by representation in a class action. But the Court of Appeals further holds that joinder in a class action does not dispense with personal joinder of the adverse claimants to the water.

This holding, which would greatly reduce the scope of Rule 23 of the Federal Rules of Civil Procedure, is in square conflict with the holding of the

Court of Appeals for the Second Circuit in *Dickinson v. Burnham*, 197 F. 2d 973. There a class action was brought on behalf of all stockholders of a corporation to impress a constructive trust upon secret profits realized by the corporation's officers. By interlocutory order following trial, the district court determined the amount of the secret profits, impressed the constructive trust on funds in that amount, and held that all stockholders of the corporation were entitled to participate therein. The district court then permitted members of such class to intervene and to present appropriate claims to share in the entrusted funds. Many, but not all, members of the class did so. The district court then entered final judgment in favor of each of the intervenors for a pro rata portion of the entrusted funds, thereby disposing entirely of the same. The mulcted officers appealed, asserting that it was improper for the trial court to permit such intervention after the trial and then to dispose of the entire fund in the absence of all stockholders who would have an interest therein.

The Court of Appeals for the Second Circuit affirmed the action of the district court. The Court of Appeals pointed out that the three categories of class action referred to in Federal Rule 23 are frequently called "true", "hybrid", and "spurious" class actions, respectively; and that it was quite proper, under Rule 23(a) (2), for the district court to impose a constructive trust, to determine the amount thereof, and dispose of the entire fund so held on constructive trust in a class action without the per-

sonal joinder of all claimants to the fund. Said the Court:

> "As to this specific question, we are quite clear that the present suit falls neatly within subdivision (2) of the rule [Rule 23], dealing with the disposition of a fund, and that the Court had full power to deal with it as it did * * *."

That is, the Second Circuit holds that a controversy as to property may be decided, and the property disposed of, in a class action where the absent claimants are to numerous to bring them all personally before the court. The Fifth Circuit holds in the case at bar that such a class action cannot proceed: if the interested claimants are too numerous for personal joinder, the Federal Courts are helpless, and the defendant must prevail.

Comparable to *Dickinson* is *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371. The Supreme Court there considered the effect of a prior injunction in a previous water rights case to which only the canal companies had been parties. The prior injunction had restrained the defendant canal companies "and all persons claiming under them" from diverting water so as to prevent a stated flow from entering the head gate of the plaintiff canal company. In holding the prior decree to be *res judicata*, this Court first held that the rights of the individual water users receiving water through the canals were bound by the prior decree:

> "We premise that the Montezuma Canal Co. and the defendant individuals and canal com-

panies in Action No. 505, whether viewed as appropriators of water or as mere carriers for others, sufficiently represented the users of the waters of the respective canals to cause such water users to be bound by the judgment. [Citing cases]."

This case then is a square holding that the rights of individual water users in respect to the water supply may be bound by judgment against representative parties, at least if the judgment effectively controls interference with the water. It follows, *a fortiori*, that it was proper in the prior suit for the injunction to issue, even though the individual water users affected were not all personally joined. The decision of the court below cannot be reconciled with the decision of this Court in *Montezuma*.

Has the Congress succeeded in granting consent to joinder of the United States in "any suit" for adjudication of water rights? Or is the Consent Statute to be emasculated by refining "any suit" to mean "only a suit" to determine all water rights on a very short stream wherein all the water users conveniently can be personally joined?

Is it possible for a Federal court to decide a water rights case on a long stream or where a large number of individual water users may be affected? Or are the powers of the Federal judiciary so shackled by its rules as to necessary parties and class actions that removal to Federal court must be equated with victory for the defendant, regardless of the merits of plaintiff's case?

The court below, by denying trial on the merits, resolved these crucial questions in a manner conflicting with prior decisions of sister circuits and of this Court.

WHEREFORE, these petitioners pray the Supreme Court to issue a writ of certiorari.

THEODORE ANDRESS
El Paso National Bank Building
El Paso, Texas

J. A. RAUHUT
W. MORGAN HUNTER
Brown Building
Austin, Texas

Attorneys for Petitioners

Of Counsel:

Andress, Lipscomb, Peticolas & Fisk
El Paso, Texas

Powell, Rauhut, McGinnis & Reavley
Austin, Texas
July, 1957

Appendix: Opinion of Court Below

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 16135

RONALD MILLER, ET AL.,
Appellants,
versus
ROBERT W. JENNINGS, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(April 12, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: Again this court has for decision another of the frequently recurring controversies resulting from the drouth in the water-

shed of the upper Rio Grande. The appellants, who were plaintiffs below, are Hudspeth County Conservation & Reclamation District No. 1, municipal corporation under Texas law; and five individuals who are landowners and water users in the Hudspeth District, and who assert that they are members of and represent a class of about 90 other landowner water users in the District. They brought an action in the District Court of Hudspeth County, Texas, against Robert W. Jennings, Regional Director of the Bureau of Reclamation, W. F. Resch, Project Manager of the Rio Grande Reclamation Project; El Paso County Water Improvement District No. 1, a Texas municipal corporation lying northwesterly of and upstream from the Hudspeth District; N. B. Phillips, Manager of the El Paso District; eleven individuals resident in Texas who are the owners of land below the Elephant Butte Dam and above the El Paso-Hudspeth County line claiming irrigation rights in the waters of the Rio Grande and alleged to represent over a thousand others, some residents of Texas and some residing in New Mexico, who are of like situation; and against the United States.

The Rio Grande Reclamation Project, as appears from the record before us, is operated by the United States for the purpose of impounding and distributing the waters of the upper Rio Grande, primarily for irrigation purposes. The waters are impounded at Elephant Butte Dam in Elephant Butte Reservoir, about 125 miles north of and upstream from the City of El Paso. The waters are distributed

through a series of ditches. Seepage and return flow waters are used and sometimes reused. The project serves an area extending from the dam and reservoir to or nearly to Fort Quitman, Texas, about 85 miles southeast of and downstream from El Paso. Nearly all the lands served or intended to be served by the Project are within the confines of an irrigation district, of which there are three in number. The farthest upstream of these is the Elephant Butte Irrigation District of New Mexico, lying wholly in New Mexico. The farthest downstream of the districts is the Hudspeth District, a plaintiff in this action, situated in Hudspeth County, Texas. Between these is the El Paso District, a defendant, situate in El Paso County, Texas.

The action, instituted in the District Court of Hudspeth County, Texas, was removed to the United States District Court for the Western District of Texas pursuant to 28 U.S.C.A. §§1441, 1442, 1446.

Seeking declaratory and injunctive relief, the plaintiffs by their petition assert that there are seven controversies between them and the defendants. The totality of the averments sets forth the plaintiffs' claim that they have rights to water of which they are being or will be deprived by or through acts and conduct of the defendants. Of these controversies the first is as to the effect of and priorities under the laws of Texas relating to appropriative water rights; the second relates to rights in drainage waters; the third raises the question as to whether methods of financing of facilities can affect

water rights; the forth and fifth call for construction of the Warren Act, 43 U.S.C.A. §523 et seq; the sixth asserts that the upper Rio Grande usually has a normal measurable flow to which riparian rights attach; and by the seventh it is contended that the consumption of water for generating electric power is an unlawful invasion of the rights of users of water for irrigation. Motions to dismiss were filed by all defendants and a number of grounds were assigned, among them being the ground that the United States had not consented to be sued nor in any way waived its sovereign immunity from suits of the character here involved. On this ground the motion was sustained and the plaintiffs' complaint was dismissed. The other grounds of the motions were not passed upon. Whether the district court erred in dismissing the complaint is the question presented to us on this appeal.

Substantially the same relief was sought by substantially the same plaintiffs in a suit against the Regional Director of Reclamation, the Project Manager, individuals as class representatives of land-owning water users and against El Paso County Water Improvement District No. 1. The suit was disposed of by the direction of this Court that it be dismissed for want of jurisdiction because it was, in essence, a suit against the United States which had not given its consent to being sued. *Hudspeth County Conservation & Reclamation District No. 1 v. Robbins*, 5 Cir. 1954, 213 F. 2d 425. In the case before us the United States is named as a defendant and its waiver of immunity from suit

is asserted under an Act of Congress of 1953 by which it is provided:

> "Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subjected to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C.A. § 666.

The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande *only in a proceeding where all persons who have rights are before the tribunal.* The Ninth

Circuit Court of Appeals has most succinctly stated the doctrine in this manner:

> "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershead and all appropriators who use water from the streams involved in another watershed in court at the same time." *People of the State of California v. United States*, 9 cir. 1956, 235 F. 2d 647, 663, See *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 36 S. Ct. 637, 60 L. Ed. 1084.

The same rule has been announced by the Texas courts, It has been held that:

> "It would be contrary to the fundamental principles of justice to enjoin the diversion and delivery of the water by the water district to these persons, thereby depriving them of its use, without their joinder in the suit, and being afforded an opportunity to assert and protect their rights. Such procedure would be contrary to the rule quoted, for they are interested in the object of the suit, and such a decree would directly affect their interests." *Wilson v. Reeves County Water Improvement District No. 1*, Tex. Civ. App., 256 S.W. 346, 347. See *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733, 107 Am. St. Rep. 653, 70 L.R.A. 964.

We are of the belief that the proceeding is not a suit for the adjudication of "rights to the use of water of a river system or other source". The United States was improperly joined and is a necessary party for a determination of the issues persented.

The order of dismissal was properly entered and will be affirmed.

It is urged by the plaintiffs that all persons having any interest in the subject matter of the suit are parties to the suit or are members of a class represented by parties to the suit. The same contention was ably argued, carefully considered, and rejected in *Martinez v. Maverick County Water Control and Improvement District No. 1*, 5 Cir. 1955, 219 F. 2d 666. There, as here, a suit was brought for a declaratory judgment as to water rights. There the plaintiffs asked for a decree reserving the right to plaintiffs to apply for injunctive relief. Here the plaintiffs pray for a declaration of their rights and for an injunction. This difference does not create a distinction. There it was said:

> "The declaratory judgment would be binding only on those parties actually before the court; each new party asserting his rights in the water of the river, in the same or any other court, would have the right to relitigate the questions already adjudged as between those before the court." *Martinez v. Maverick County Water Control and Inprovement Dist. No. 1*, 5 Cir. 1955, 219 F. 2d 666, 672.

The district court did not consider nor do we need consider the other questions raised. The district court's judgment is

AFFIRMED

CAMERON, Circuit Judge, dissenting.

Appendix: Judgment of Court Below

Extract from the Minutes of April 12, 1957

RONALD MILLER, ET AL.,

No. 16135 versus

ROBERT W. JENNINGS, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Ronald Miller, and others, and the sureties on the appeal bond herein, American Employers' Insurance Company, Hal Daugherty and Al W. Uhlig, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

SEP 3 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 253

RONALD MILLER, ET AL,
Petitioners,

v.

ROBERT W. JENNINGS, ET AL,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

THEODORE ANDRESS
El Paso National Bank Building
El Paso, Texas

J. A. RAUHUT
W. MORGAN HUNTER
Brown Building
Austin, Texas
Attorneys for Petitioners

Of Counsel:

Andress, Lipscomb, Peticolas & Fisk
El Paso, Texas.

Powell, Rauhut, McGinnis & Reavley
Austin, Texas

August, 1957

IN THE

Supreme Court of the United States

October Term, 1957

No. 253

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May It Please The Court:

In *Weil, Water Rights in the Western States*, 3rd Ed. (1911), Chapter 51, headed "Determination of Priorities by Special Proceedings in Court", describes special statutory proceedings, initiated or conducted by state administrative agencies, which are provided in a handful of states for determination of relative water rights on particular streams or segments thereof. Contrary to the assertion of the Solicitor General, this type of proceeding is not provided by statute in all the western states. In particular, no such statutory proceeding is provid-

ed in Texas, where water rights have long been adjudicated in conventional suits for injunction. *Cf., e.g., Wilson v. Reeves County W. I. Dist. No. 1*, Tex. Civ. App., 265 S.W. 346, and *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733, both cited by the court below.

That the scope of the Consent Statute is not limited to special statutory proceedings in a few states, as asserted by the Solicitor General, is clear from the text of the Consent Statute itself which expressly extends consent to "**any suit** for the adjudication" or administration of water rights. Surely, had Congress intended to limit its consent to special statutory proceedings initiated or conducted by public agencies, Congress could and would have said so.

Neither is the Consent Statute by its terms limited to cases to which all the water users of a particular stream are necessary or indispensable parties. The consent extends to ~~any suit~~ for the adjudication or administration of water rights. The only requirement as to parties is that **the United States** be a necessary party to such suit.

No amount of legislative history can alter a clear and unambiguous statute. Read in context, Senator McCarran's letter (quoted in part at Sol. Gen. Br. 7) does not even purport to do so. Looking at the whole of the Senate Report cited in the Solicitor General's brief, it is manifest that the correspondence sought only to make clear that the Consent Statute should not be utilized to delay condemnation under eminent domain of property necessary for Government Reclamation projects, whether or not water rights might be in dispute.

Senator McCarran's letter further points out that the purpose of the Consent Statute is to permit joinder of the United States wherein "it [to join the United States as a party defendant] is necessary in order to adjudicate all of the rights of the various land owners." That is, the United States may be joined when it ought to be a party "if complete relief is to be accorded between those already parties." Wherein does Senator McCarran's informal definition of "necessary party", as applied **to the United States** in a water-rights suit, differ in substance from the definition of "necessary party" found in Rule 19, Federal Rules of Civil Procedure?

Neither Senator McCarran's letter nor anything else in the legislative history indicates an intent to limit consent to cases in which parties **other than the United States** were necessary parties. On the contrary, both the Senate and the House passed the Consent Statute only upon consideration of the objection by the Justice Department:

> "The general waiver of the immunity of the United States to suits involving water rights would seem objectionable. It is likely that such a general waiver would result in the piece-meal adjudication of water rights, in turn resulting in a multiplicity of action * * *."[1]

Had the Congress indeed intended that consent be limited to particular statutory proceedings to which all water users on a stream should be necessary parties, would the Congress have calmly ignored the

[1] Letter of Deputy Attorney General, Senate Report No. 711, 82nd Cong., 1st Sess. p. 7. Same letter read to House of Representatives, Cong. Rec. 82nd Cong., p. 9445.

advice of the Attorney General that the language chosen would grant a "general waiver of immunity" to all manner of suits "involving" water rights, and would result in "piece-meal adjudication" and "multiplicity of actions?" Obviously not. There could be no "piece-meal adjudication" or "multiplicity of actions" if the consent were limited to actions to which all water users on the stream were parties.

It is, of course, the Justice Department's privilege now to tell this Court that the statutory language **does not mean** what the Justice Department expressly assured the Congress the statutory language **did mean**. But in appraising the Congressional "intent" shown by the legislative history, what counts is what the Justice Department told the Congress the statute would achieve.

All the waters in controversy are in the physical possession and control of the Reclamation officials who are named as defendants. The plaintiffs seek to enjoin such officials from withholding from plaintiffs and diverting to upstream water users the waters to which plaintiffs are entitled. If the injunction which plaintiffs seek is granted; the water supply available to such upstream water users will be correspondingly reduced. We assume, therefore, that thousands of upstream water users receiving water through the Reclamation Project are necessary parties to this action.

But the great number of the upstream water users, and the common effect upon their common water supply of the injunction which plaintiffs seek, are exactly what make it appropriate that this controversy be resolved in a class action. Rule 23 (a)

(2), Federal Rules of Civil Procedure, specifically authorizes a "hybrid" class action where "the object of the action is the adjudication of claims which do or may effect specific property involved in the action * * *." There is nothing in the Rule limiting its scope to instances wherein the property involved is in the possession of the Court, rather than in that of named defendants.

By mis-mating cases which impose stiff requirements as to "necessary" parties with cases (such as *Martinez v. Maverick District*, 219 F.2d 666) which greatly limit Rule 23, respondents conclude (a) that the water users are necessary parties because the judgment sought **will affect** the water supply in controversy, and (b) that the controversy cannot be presented in a class action because the judgment sought **will not affect** the water supply involved in the action. So self-contradictory a conclusion clearly cannot be valid. That it may be supported by authorities, however, strongly underlines the importance of the Supreme Court's intervening to place such authorities in proper focus.

That the decision of the Court below conflicts with all decisions affording vitality to Rule 23 is further shown by the fact that plaintiffs' class and the upstream defendants' class both assert that their respective water rights have been acquired by all class members **in common**, by virtue of the Rio Grande Compact and/or the old New Mexico Notice of Intent to Appropriate. (R. 60-62, pars. 3.1-3.7). And defendants assert and plaintiffs dispute that, by the relinquishment clauses of the Warren Act contracts, the plaintiffs' class **in common** granted perpetually

superior rights unto the upstream defendants' class **in common** (R. 70-72, pars. 7.1-17.2) Indeed the upstream defendants argue this **common** defense on the merits at page 24 of their Brief in Opposition. Thus this is a "true" class action in which "the character of the rights sought to be enforced for or against the class is * * * **common** * * *". Rule 23 (a) (1).

Rule 23 draws no distinction between class actions wherein the class representatives are plaintiffs and those wherein they are defendants. Notably in *El Paso District, together with the United States v. City of El Paso*, 243 F.2d 927, Pet. for Cert. pending as No. 198 this term, the Court of Appeals for the Fifth Circuit affirmed a judgment in a water rights case brought as a class action by representatives of all water users within El Paso District. This decision squarely conflicts with any holding that a water-rights case *qua* water-rights case cannot be presented as a class action.

We strongly disagree with the various contentions of the respondents to the effect (a) that the upstream defendants are entitled to win this action on its merits, (b) that for a Court to enjoin interference with water rights would transgress upon the perogatives of the Secretary of the Interior, and (c) that the Secretary of the Interior, the Elephant Butte Irrigation District of New Mexico, and/or landowners within that District are indispensable parties. However, we will not now reply to these contentions since the Court of Appeals did not discuss any of them in its opinion.

WHEREFORE, these petitioners pray the Supreme Court to issue a writ of certiorari.

THEODORE ANDRESS
El Paso National Bank Building
El Paso, Texas

J. A. RAUHUT
W. MORGAN HUNTER
Brown Building
Austin, Texas

Attorneys for Petitioners

Of Counsel:

Andress, Lipscomb, Peticolas & Fisk
El Paso, Texas

Powell, Rauhut, McGinnis & Reavley
Austin, Texas

August, 1957

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No. 253

In the

Supreme Court of the United States

OCTOBER TERM, 1957

RONALD MILLER, *et al.*,

Petitioners,

v.

ROBERT W. JENNINGS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR ALL RESPONDENTS EXCEPT THE UNITED STATES OF AMERICA, ROBERT W. JENNINGS AND W. F. RESCH

EUGENE T. EDWARDS,
11th Floor Bassett Tower,
El Paso, Texas.
Counsel for said Respondents.

LOUIS A. SCOTT,
1100 First National Building,
El Paso, Texas,
Of Counsel.

WARLICK LAW INC.—1207 HOGG STREET—DALLAS—RI 1-6711

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OPINIONS BELOW

There was no opinion written by the District Court. The opinion of the Court of Appeals for the Fifth Circuit, and the dissenting opinion (App. 17, Petition), are reported at 243 F. 2d 157.

JURISDICTION

Petitioners' statement of jurisdiction, Petition 2 and 6, is considered adequate.

QUESTION PRESENTED

Whether the District Court erred in dismissing Plaintiffs' First Amended Complaint.

This overall question includes three others, an affirmative answer to any one of which requires an affirmative answer to the primary question itself:

I.

Whether the United States has consented to be sued in the kind of action set forth in Plaintiffs' First Amended Complaint (R. 54-57).

II.

Whether Plaintiffs' First Amended Complaint states a claim against Respondents upon which relief can be granted.

III.

Whether it appears from the face of Plaintiffs' First Amended Complaint and from facts within the judicial notice of the Court that the Elephant Butte Irrigation District of New Mexico and/or its constituent land owners in New Mexico, being the owners of water rights appurtenant to lands in New Mexico, under the Reclamation Laws of

the United States, who have not been served with any process to require their appearance herein, who have not appeared herein, and who reside beyond the jurisdiction of the trial court, are indispensable parties to this litigation.

STATEMENT OF THE CASE

Petitioners' Statement of the Case, Petition 4, is sufficiently inaccurate in some respects to require correction.

The Rio Grande Federal Reclamation Project is not owned by the United States Government. It is owned by the individual farmers whose lands comprise the New Mexico unit of the Project, known as the Elephant Butte Irrigation District, and by the individual farmers whose lands make up the Texas unit of the Project, known as the El Paso County Water Improvement District No. 1, the latter being one of the Respondents herein.

It is the facilities necessary for the storage and transportation of water to the land which are owned and operated by the United States.

When it is said, page 4, Petition, that "The Project serves an area extending from Elephant Butte Dam nearly to Fort Quitman, Texas, about 85 miles downstream from El Paso. Substantially all the irrigable lands within this area lie within the confines of three irrigation districts. The farthest upstream is Elephant Butte Irrigation Dis-

* Last clause, section 6, Reclamation Act of June 17, 1902, 32 Stat. 388, 389: "*Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress." Section 6 is set out in full in App. B.

trict of New Mexico, lying wholly in New Mexico; the farthest downstream of the district is the Hudspeth County Conservation and Reclamation District No. 1, within Hudspeth County, Texas; between these is the El Paso County Water Improvement District No. 1, within El Paso County, Texas," one not familiar with the situation would be led to believe that the Hudspeth County Conservation and Reclamation District No. 1 is a part of the Rio Grande Federal Reclamation Project, but this is not correct. The Hudspeth District is not now and never was a part of the Project.[1]

Again, on page 5 of the Petition, the statement is made that "Beginning in 1951, as a 'conservation' measure the Reclamation officials *cut off the flow of water* to the landowners of Hudspeth District * * *." This is misleading in that it was nature and not the Reclamation officials that caused the scarcity of water. Under normal conditions the average delivery of water to first class Project water right lands is about 3 acre *feet* per acre per year. On account of the drought the allotment was cut until in 1955 there was delivered to Project lands *5 inches* per acre for the year; in 1956, 4.7 *inches* for the year, and for the present year of 1957 the allotment has been set for a fraction over 6 *inches*. There simply has not been enough water with which to supply even Project lands, and the idea that

[1] Hudspeth County Conservation & Reclamation District No. 1, et al., v. Robbins, *et al.*, 214 F. 2d 425, 431, note 6; First Amended Complaint, paragraph 2 (R. 58, shows the Project ends at the El Paso-Hudspeth County Line, and in paragraph VI, R. 68, shows the Hudspeth County District to be a Warren Act contractor which it would not be if it were part of the Project.

there was any surplus to "flow" to Warren Act contractors such as Petitioner is wholly fantastic.

The nature of the suit now presented for consideration of this Court is best shown by the First Amended Complaint, R. 54-77. We submit that it is not one "for the adjudication of rights to the use of water of a river system."

ARGUMENT

I.

The Decision Below Is Clearly Correct.

(1) The trial court was without jurisdiction in this case for at least two reasons:

(a) The United States may not be sued without its consent. The question here is whether that consent has been given by the Act of July 10, 1952, enacted as a part of the *Department of Justice Appropriation Act, 1953, C. 651, Title II, Sec. 208, 66 Stat. 560, 43 U. S. C., Sec. 666,* which is the only method by which Petitioners claim that the United States has waived its sovereign immunity in this action.

For the Congress to waive sovereign immunity in one kind of a case does not authorize suit against the Government in some other kind of a case. A plaintiff must bring himself within the express terms of an Act of Congress waiving immunity in specific cases. *McMahon v. United States, 342 U. S. 25, 27, 96 L. Ed. 26, 30.*

Appendix A.

The Act of July 10, 1952, on which reliance is placed by Petitioners, gives consent for the joinder of the United States *only* in the event that such suit is brought for either one of two purposes:

> (1) "for the *adjudication of rights* to the *use of water of a river system or other source*, or
>
> (2) "for the *administration of such rights*, where it appears that the United States is the *owner* of, or is in the process of acquiring, water rights by appropriation under state law, * * * and the United States is a necessary party to such suit." (Emphasis ours.)

A casual reading of the Complaint (R. 54-57), shows that it is not a suit for the administration of water rights, and a more deliberate consideration of it in detail shows that it is not a suit for the adjudication of rights to the use of the waters of the Rio Grande river system, either, but is an effort to determine eight other questions:

1. Whether rights to use Rio Grande water in Texas may be acquired only in conformity with state law. (Complaint III, 3.6 and 3.7, R. 61-62.)

2. Whether rights to use of certain drainage water have been appropriated. (Complaint IV, 4.11, R. 65.)

3. Whether water rights are affected by methods of financing. (Complaint V, 5.7, R. 67.)

4. Whether under the Warren Act the Secretary of the Interior may contract only for the physical impounding, storage and carriage of water. (Complaint VI, 6.4, R. 69.)

5. Whether the United States, under the Reclamation Laws and Warren Act, owns any water rights; or the rights of Hudspeth County farmers can be re-

stricted by Warren Act contracts; or the Hudspeth District may subordinate the rights of its constituents to those of anybody else. (Complaint VII, 7.6, 7.7 and 7.8, R. 71-73.)

6. Whether in normal years the Rio Grande has a perceptible and calculable normal flow to which riparian rights attach. (Complaint VIII, 8.5, R. 74.)

7. Whether use of water by the United States for operation of a hydro-electric plant at Elephant Butte is an unlawful invasion of water rights of all down stream farmers. (Complaint IX, 9.9, R. 76.)

8. Whether the defendant Reclamation officials should be enjoined from diverting water "to or for the named defendants, and to or for the other members of the class which the named defendants represent, in such a way as to interfere with the rights of the plaintiffs as herein alleged." (Complaint X, 10.3, R. 77.)

The settlement of those questions would in no way determine the amount of water which any plaintiff or any defendant would be entitled to receive; nor would it determine the proportion of the total water in any stretch of the Rio Grande at any stated time which any plaintiff or any defendant would be entitled to receive; nor would it make any kind of allotment on an acre basis to anybody, either plaintiff or defendant.

Neither would it determine priorities between any plaintiff and any defendant; nor between Hudspeth County users and El Paso County users; nor between Texas users and New Mexico users, all of which priorities, whatever they are, do exist, and must be established in any adjudi-

cation of water rights if the action is "for the adjudication of rights to the use of water of a river system."

Nowhere in the Complaint is it set forth *what* claimed water rights any plaintiff seeks to establish against any defendant, but when taken as a whole shows on its face that it is merely an effort to secure an advisory opinion on generalities and attempts a class action involving drainage water from artificial canals which are a part of a Federal Reclamation Project. The action simply is not one for adjudication of rights to the use of water of a river system within the meaning of the Act of July 10, 1952, and has been pyramided into something far beyond the limits of, and never contemplated by, that Act. It would be as logical to claim that the United States had waived its sovereign immunity in this case by the passage by Congress of the Tucker Act or the Federal Tort Claims Act.

A suit for the adjudication of water rights in a stream is one *sui generis*. *2 Weil, Water Rights in the Western States (3rd Ed.), page 1125; Hough v. Porter, 51 Oreg. 318, 439, 98 Pac. 1083, 1109, col. 2;* and in the very recent decision by the Ninth United States Court of Appeals, *People of the State of California v. United States, 235 F. 2d 647, 663*, it was said:

> "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time."

Not only is this rule recognized by the Federal Courts, but also it is Texas state law, announced, for instance, by the El Paso Court of Civil Appeals in this manner:

> "It would be contrary to the fundamental principles of justice to enjoin the diversion and delivery of the water by the water district to these persons, thereby depriving them of its use, without their joinder in the suit, and being afforded an opportunity to assert and protect their rights. Such procedure would be contrary to the rule quoted, for they are interested in the object of the suit, and such a decree would directly affect their interests." *Wilson v. Reeves County Water Improvement District No. 1, 256 S. W. 346, 347.*

Petitioners' claim that the Act of July 10, 1952, should be liberally construed to permit this suit is contrary to what was announced in *Larson v. Domestic and Foreign Commerce Corporation, 337 U. S. 682, 703, 93 L. Ed. 1628, 1643*, as follows:

> "It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to *suits for damages*. The Congress has increasingly permitted such suits to be maintained against the sovereign, and we should give hospitable scope to that trend. *But the reasoning is not applicable to suits for specific relief.* For, it is one thing to provide a method by which a citizen may be *compensated* for a wrong done to him by the Government. *It is a far different matter to permit a court to exercise its compulsory powers to restrain the Government from acting, or to compel it to act.* There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a

whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right." (Emphasis ours.)

In the case at bar Petitioners ask for specific relief and seek by injunction to "stop the Government in its tracks" while it is undertaking to operate the Rio Grande Federal Reclamation Project through the Secretary of the Interior in whom the responsibility is placed by *Section 10 of the Reclamation Act, 32 Stat. 388, 390.*

(Appendix B.

(b) The will of a court may not be substituted for that of the Secretary of the Interior who is charged with the responsibility for the administration of the properties involved in this proceeding by that section of the statute just mentioned. *United States v. Ide, 277 Fed. 373, 382, Par. 8, aff'd. Ide v. United States, 263 U. S. 497, 68 L. Ed. 407; State of New Mexico v. Baeker, 199 F. 2d 426, 428, C. A. 10; Hudspeth County Conservation & Reclamation District No. 1 v. Robbins, 213 F. 2d 425, 432.*

In the *Ide* case (8th Circuit), the court said:

"It is well settled that the plaintiff (United States) may construct drainage works as a part of its irrigation system. * * * The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts * * *.

"The right of the plaintiff to save and continue the use of the drainage, seepage, and waste waters of its project is established by the following cases: (Citing cases.)

> "The permits granted by the State of Wyoming to the defendants could not authorize the defendants to take the waters of the plaintiff, and, as Bitter creek was not a natural stream, said permits gave no authority to take water from Bitter creek. * * * The law is clear, in our opinion, that the plaintiff had the right to save and continue to use the drainage, seepage, and waste waters of its project as long as such water could be identified and had not been abandoned." *277 Fed. 382, 383.*

In the *Backer* case the plaintiff sought to restrain Reclamation officials from reducing the quantity of water in Elephant Butte Reservoir to a point which would destroy the fish in the reservoir and create a health menace to the people of Trust or Consequences, and in the Hudspeth County case the plaintiffs, who were the same plaintiffs as those in the present case, sought to do there just what they are trying to do now. In the latter case the court said:

> "Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment * * * or by injunction against government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress." *213 F. 2d at 432.*

Section 10 of the Reclamation Act (32 Stat. 388, 390), provides: "That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

Respecting this section, this Court said: "Authority could hardly have been conferred in more comprehensive terms * * *." *Henkel v. United States, 237 U. S. 43, 50, 59 L. Ed. 831, 835.*

The Plaintiffs' First Amended Complaint alleges in Paragraph II, 2.3 thereof, that:

> "Most of the lands hitherto irrigated from the Rio Grande in the Elephant Butte-Fort Quitman area lie within the municipal limits of three contiguous irrigation districts: (a) Elephant Butte Irrigation District of New Mexico * * * the municipal limits of which embrace substantially all the irrigated lands in New Mexico; (b) El Paso District, the municipal limits of which embrace substantially all the irrigated lands within El Paso County, Texas; (c) Hudspeth District, the municipal limits of which embrace some 30 square miles of land in the extreme southwesterly portion of Hudspeth County, Texas * * *." (R. 58.)

and in Paragraph II, 2.4, that:

> "The Rio Grande Project is a Government reclamation project embracing Elephant Butte Dam and Reservoir and a great network of irrigation ditches and other works. * * * All the irrigation works within Elephant Butte and El Paso Districts are operated by the Bureau of Reclamation as a part of the Rio Grande Project, those two districts having similar contracts with the United States with respect to operation and maintenance of such works." (R. 58.)

One of these contracts, being that between the United States and Elephant Butte Irrigation District dated November 9, 1937, is in the record as Defendants' Exhibit No. 2 (R. 179-203). This contract made pursuant to the Reclamation Laws, including the Bureau of Reclamation

part of the Interior Department Appropriation Act, fiscal year 1938, approved August 9, 1937, *50 Stat. 564 at 593*, sets forth the manner and terms upon which the United States would deliver water from storage to those lands which composed the area within the Elephant Butte Irrigation District and also transferred to the United States, insofar as the rights of this district were concerned, the right to operate a hydro-electric plant at Elephant Butte Dam. By plaintiffs' admissions, a similar contract was made between the United States and the El Paso County Water Improvement District No. 1.

In addition, the United States made certain Warren Act contracts with Plaintiff Hudspeth County Conservation & Reclamation District No. 1, defining the water rights of plaintiffs in the use of water from the Rio Grande (Complaint VII, 7.1-7.8, R. 70-73).

Notwithstanding all of the above, the Petitioners in the present suit ask the court to substitute its will for that of the Secretary of the Interior, with respect to the disposition of drainage and seepage waters of the Rio Grande Project (Complaint IV, R. 62-66), and ask for a holding in conflict with the discretion of the Secretary of the Interior as expressed in the three separate contracts between the United States and the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1, and the Hudspeth County Conservation & Reclamation District No. 1. This they may not do under the decisions cited above.

(2) The Plaintiffs' First Amended Complaint does not state a claim against the defendants upon which relief can be granted because:

It is an attempted class action forbidden by the law as applied to the facts, in that the Complaint seeks to maintain a class action by five Texas citizens of Hudspeth County against "adverse claimants (who) number more than one thousand, many of whom reside outside the State of Texas" (First Amended Complaint I, 1.4, R. 55), by joining eleven individual defendants, all of whom are shown by the same paragraph of the Complaint to be residents of Texas, as supposed representatives of these admittedly more than one thousand adversely interested parties, but such action cannot be supported for the reason that plaintiffs' Complaint shows on its face that if what is pleaded therein is true, these numerous individuals are in competition with each other and do not constitute a single class with a joint interest.

For instance, Complaint III, 3.2 (R. 60), alleges that for many years waters of the Rio Grande have been used for irrigation in the El Paso District and Hudspeth District within the limitations of a notice of intent to appropriate filed with the appropriate state agency, and that others using the waters largely outside the terms of such notice or permit claim appropriative rights to the continued use of such waters.

With reference to appropriative rights, the first in time is the first in right.[5] Consequently, the "more than one thousand" individual defendants have conflicting interests in competition with each other and with the eleven Texas citizens upon whom Petitioners seek to force involuntary representation not only of those who happen to be Texas citizen land owners, but also the large number of New Mexico citizen land owners.

In Paragraph III, 3.3 of the Complaint (R. 60-61), it is said that appropriative water rights can be acquired only from the state and that priority of rights depends on the effective date of the state authorization, while in Paragraph III, 3.6 (R. 61-62), it is contended that by the Rio Grande Compact the State of Texas made a waiver respecting water uses in the Rio Grande Valley "with respect to all farmers who made beneficial use of the waters of the Rio Grande above Fort Quitman prior to the effective date of the Compact, namely May 31, 1939" and that "the relative priority (as against other appropriations using water above Fort Quitman) of the water rights covered by said waiver is as of said May 31, 1939."

In addition, this Court judicially knows that New Mexico is among those states in which the common law doctrine of riparian rights is not recognized, and the right to the use of water for irrigation purposes is based solely on the doctrine of appropriation (New Mexico authorities previously

[5]The first clause of Article 7472, Revised Civil Statutes of Texas, reads: "As between appropriators, the first in time is the first in right * * *."

As to New Mexico: Albuquerque Land & Irrigation Co. v. Gutierres, 10 N. M. 177, 61 Pac. 357, 360 (1900, prior to statehood), and Article XVI, Sec. 2 of the State Constitution, has for its last sentence: "Priority of appropriation shall give the better right."

cited, *Hinderlinder v. LaPlata River & Cherry Creek Ditch Co., 304 U. S. 92, 98, 82 L. Ed. 1202*), while Texas is operating under a sort of hybrid doctrine in which riparian rights are still recognized. *Motl v. Boyd, 116 Tex. 82, 108, 286 S. W. 458, 467.*

Further, in Texas, as shown by that case, same page citation, the existence of riparian rights depends on whether the surveys abutting on the Rio Grande were patented by the State of Texas before or after the passage by the legislature of the Water Appropriation Act of 1889.

In Paragraph I, 1.4 of the First Amended Complaint, the plaintiffs allege with reference to the individual defendants named therein, that they "are sued individually and as representatives of all land owners or water users claiming adversely to Plaintiffs in rights to the use for irrigation of the waters of the Rio Grande (or the return flow therefrom) between Elephant Butte Dam and the El Paso-Hudspeth County line" (R. 56). That certainly includes all of the land owners of the Elephant Butte Irrigation District in New Mexico, and which itself holds a contract with the United States under which, among other things, it receives pecuniary benefits from the government in exchange for its release of its right to the use of the Rio Grande water for power purposes (Par. 4, R. 184), and eleven Texas citizens cannot be proper individuals to represent this municipal corporation and the numerous crowd of New Mexico citizens whose rights are sought to be curtailed by plaintiffs in this proceeding, even if plaintiffs qualified as adequate representatives of all Texas owners of land abutting on the Rio Grande, which we do not concede, because

the interest of these eleven defendants is to secure more water for Texas as against New Mexico.

Petitioners seek by this suit to establish the proposition that the rights of individual land owners to water depend solely upon priorities controlled alone by state water laws of general application. That knocks the "class" completely apart. In a proper case such a suit can be brought against several defendants as representatives of many, but in the circumstances and on the facts alleged by Petitioners herein in their Complaint, a class action cannot be maintained according to the holdings of both federal and state courts: *Christopher v. Brusselback*, 302 U. S. 500, 82 L. Ed. 388; *Ayers v. Carver*, 15 How. 591, 15 L. Ed. 179; *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 22; *Kentucky Home Mutual Life Ins. Co. v. Dalby*, 190 F. 2d 797, 803, C. A. 6; *Knioum v. Slattery*, 239 S. W. 2d 865, Tex. Civ. Apps., wr. ref.; *Meyer v. Wichita County Water Improvement Districts*, 265 S. W. 2d 660, 662, Tex. Civ. Apps., wr. er. ref., n.r.e.; *Olsen v. Superior Court*, 276 Pac. 2d 168, 173, Calif. D. Ct. Apps.

(3) The Elephant Butte Irrigation District, a municipal corporation of the State of New Mexico and a very numerous crowd of land owners in New Mexico, whose interests according to the plaintiffs' petition are adverse to those of plaintiffs, are indispensable parties who have not been joined.

In *Shields v. Barrow*, 17 How. 130, 139, 15 L. Ed. 158, 160, the rule was laid down that indispensable parties are:

> "Persons who not only have an interest in the controversy, but an interest of such a nature that a final

> decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

Texas' highest court is also in accord with this principle, for in *Veal v. Thomason, 138 Tex. 341, 159 S. W. 2d 472, 477, Par. 7*, it is stated:

> "It has many times been held by the courts of this State that those who are necessary parties to a suit are such persons as have or claim a direct interest in the object and subject matter of the suit and whose interests will necessarily be affected by any judgment that may be rendered therein. Such persons are not only proper parties but are necessary and indispensable parties, plaintiff or defendant."

The object of the suit in the case at bar is to secure more water from the Rio Grande for farmers in Hudspeth County, Texas, and as there has not been enough water in the river to serve everybody for a number of years, this necessarily means that, if relief prayed for is granted, the land owners in New Mexico would get even less water, in accordance with their respective priorities, than they get now. It is obvious that their interests are directly and vitally affected.

Furthermore, the Petitioners seek by injunction to control the operation by the United States of the hydro-electric plant at Elephant Butte Dam in New Mexico [Amended Complaint, Par. IX. (R. 74-76), and Par. X, 10.1 and 10.3 (R. 76-77)].

But the Government's right to operate this plant is grounded, among other things, on a contract with Elephant

Butte Irrigation District of New Mexico, which came about as the result of Congressional action.

The Interior Department Appropriation Act, fiscal year 1938, under the caption "Bureau of Reclamation" *(50 Stat. 564, 593)*,[1] authorized the Secretary of the Interior to enter into a contract with El Paso County Water Improvement District No. 1 and with the Elephant Butte Irrigation District of New Mexico, by which the districts should be relieved of the construction cost of Elephant Butte Dam chargeable to development of power at that point.

Article 4 of the contract made between the United States and the Elephant Butte Irrigation District of New Mexico, dated November 9, 1937 (Defendants' Exhibit 2, R. 179), pursuant to authority of the above statute provided that the District desired to receive the benefits of the Act as consideration for the "conveyance by the District, for itself and the land owners therein, to the United States of all the right, title, interest and estate of the District and its land owners in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy." (R. 184.)

The other provisions of the contract carry this into effect, and Paragraph 12 (R. 192) provides that "Pursuant to subsection J of Section 4 of the Act of December 5, 1924 (43 Stat. 703), collections of water rental charges under the contract between the United States and the Hudspeth County Conservation & Reclamation District No. 1, dated

[1] Appendix C.

December 1, 1924 * * * will be credited to the District's obligation" in the manner set forth.

In *Green v. Brophy, 110 F. 2d 539, 541*, the Court of Appeals for the District of Columbia said:

> "* * * litigation requiring decision as to the legal consequences to be attached to a relationship where only one party to the relationship is made a party to the action is perhaps the clearest case of failure to join an indispensable party."

In addition we refer this Court to *Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 233, 83 L. Ed. 126, 142*, and *Commonwealth Trust Co. v. Smith, 266 U. S. 152, 69 L. Ed. 219.*

II.

There Is No Conflict of Decision.

In affirming the correctness of the action of the District Judge in dismissing the Plaintiff's First Amended Complaint, what the Court of Appeals held was that the pleading in question did not set forth an action "for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise," within the meaning of the Act of July 10, 1952, *43 U. S. C. A. Sec. 666.*

We have examined all of the cases alleged by Petitioners to be in conflict with this holding. They are: *United States*

v. Aetna Casualty & Surety Co., 338 U. S. 366 (erroneously cited as *388 U. S. 338*); *United States v. Yellow Cab Co., 340 U. S. 543*; *Indian Towing Company v. United States, 350 U. S. 61*; and *People of the State of California v. United States, 235 F. 2d 647, C. A. 9*; to all of which reference is made on page 8 of the Petition, together with *Dickinson v. Burnham, 197 F. 2d 973, Petition 13*, and *Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, Petition 14*.

With the exception of *People of California* and *Montezuma*, all of them show such an obvious dissimilarity of subject matter, and law applied thereto, from that of the present case that comment on them seems unnecessary.

There is no conflict with *People of California v. United States, 235 F. 2d 647*. Petitioners seem to have overlooked the fact that in that case there were "some three thousand (3,000) defendants," and that "The United States brought into the trial court *all of the other claimants of the river system*, praying that its title to water right *as the land owner* at the mouth be quieted against each and all." (Emphasis supplied.) *235 F. 2d at 652*.

On these facts it may be true that the action was one for the adjudication of rights to the use of water of a river system, and, as suggested by the Court, "By final judgment, the District Court is empowered to grant complete relief as to all claimants and the United States, adjudicate the water rights, set up control systems and require physical solutions of specific problems, equitably charging the

xpense thereof to the claimant of surplus so created." *5 F. 2d at 652-653.* Why not, with everybody in court?

Neither is there any conflict with *Montezuma Canal Co. Smithville Canal Co., 218 U. S. 371.* In that case the nithville Canal Company and the Central Canal Company nd the water users under these canals sued the Monteuma and other canal companies and the water users under ose canals to determine the rights of appropriators ithin Grahain County, Arizona, *218 U. S. at 372.* Thus gain everybody concerned was in court for that trial.

Montezuma filed a cross-bill against the San Jose Comny and various other defendants, setting up as *res adjuata* a decree entered February 17, 1897, in another tion numbered 805, wherein Montezuma was plaintiff d the San Jose Company was a defendant along with hers, in which it was determined that Montezuma Canal mpany had certain rights to flow and that San Jose and ose claiming under it be enjoined from obstructing that w. *218 U. S. at 373 and 376-377.*

In the main suit the Court said:

> "The different incorporated canal companies, who are parties plaintiff and defendant herein, are * * * incorporated * * * and own and control the several canals, * * *, originally operated by unincorporated partnerships or societies and * * * are the successors to the unincorporated owners of the several canals, and are in every instance carrying the water for the use of the landowners or the successors in interest of the landowners who were the original appropriators of the water carried therein for irrigation purposes.

> * * * None of the several parties hereto who are landowners, appropriators of water, or who are receiving water for irrigation from the different incorporated companies or through the several canals owned by the parties hereto, have ever maintained their right to their several priorities as against the co-owners of land or co-users of water in their respective canals, *but the individual landowners and appropriators of water that is furnished under the management of each of the several ditches or canals, herein referred to have surrendered to their co-users in that canal their priority, and the water that is taken from the river for the use of the land under the several canals has been, by the consent of the different landowners under each canal, delivered to the different tracts of land in accordance with the extent of the interest in the ditch or canal of each landowner*, regardless of the acreage cultivated by the said landowner, and regardless of the date when said acreage was placed under cultivation." (Emphasis added.) *218 U. S. at 376.*

The question, therefore, arose in the main suit as to whether due effect was given to the decree of February 17, 1897, in the previous action, No. 505, and in holding that it was not, the court with this background of facts said as quoted at pages 14-15, Petition:

> "We premise that the Montezuma Canal Company and the defendant, individuals and canal companies in action No. 505, whether viewed as appropriators of water or as mere carriers for others, sufficiently represented the users of the waters of the respective canals to cause such water users to be bound by the judgment." *218 U. S. at 382.*

We have no criticism of that premise as applied to the facts of that case, and there is nothing in that case which militates against the holding of the Fifth Court of Appeals

in the one under consideration, wherein the plaintiff landowners insist that the Petitioner Hudspeth County Conservation and Reclamation District has no authority to bind them in their water rights which are individually determined by state authorization based on which every man has a priority depending on the date of his permit. See Plaintiffs' First Amended Complaint, R. 54, particularly Paragraph "III. First Controversy: State Authorization," R. 60, and Paragraph "VII. Fifth Controversy: Effect of Contracts," R. 70.

We respectfully submit that the real purpose of this action filed by Petitioners was not to adjudicate the rights to the use of the waters of the Rio Grande river system but to attempt to get out of a Warren Act contract which Petitioners made with the United States on December 1, 1924, as amended April 27, 1951. This seems rather obvious from the language of the Complaint in the paragraph last mentioned, for if the Petitioners got a trial on the merits they would have no case at all if that Warrent Act contract is valid. This is made even more clear by a reading of the opinion of the court in *Hudspeth County Conservation and Reclamation District No. 1 et al. v. Robbins, et al.*, 213 F. 2d 425, cer. cert. den. 348 U. S. 833.

III.

There Is No Important Question of Federal Law.

The Court below having decided simply that the Petitioners did not bring a suit against the United States of

the character concerning which sovereign immunity has been waived by the Act of July 10, 1952, the holding can be of little or no importance to anyone other than the parties to this particular suit. The Court did not in any way pass upon the validity of the Act itself, nor was it questioned by any of the parties. The law still is, as provided by the Act, that the United States may be joined in any suit for the adjudication of rights to the use of water of a river system. It is not believed that a decision of inadequacy of a plaintiff's pleading to set out the character of action authorized by statute raises a question of such importance that it, without something more, is sufficient to warrant review by this Court, particularly when the decision below is clearly correct.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition For A Writ of Certiorari filed herein should be denied.

Respectfully submitted,

EUGENE T. EDWARDS,
11th Floor Bassett Tower,
El Paso, Texas,
Counsel for said Respondents.

LOUIS A. SCOTT,
1100 First National Building,
El Paso, Texas,
Of Counsel.

APPENDIX A

Act of July 10, 1952, 66 Stat. 560, C. 651, Title II, Sec. 208 (43 U. S. C. Sec. 666):

Sec. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving

the right of States to the use of the water of any interstate stream.

(d) None of the funds appropriated by this title may be used in the preparation or prosecution of the suit in the United States District Court for the Southern District of California, Southern Division, by the United States of America against Fallbrook Public Utility District, a public service corporation of the State of California, and others.

APPENDIX B

Reclamation Act of June 17, 1902, 32 Stat. 388, Sections 6 and 10:

* * * * *

Sec. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

* * * * *

Sec. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

APPENDIX C

Interior Department Appropriation Act, Fiscal Year 1948, "Bureau of Reclamation"—50 Stat. 564, 593.

Rio Grande project, New Mexico-Texas: For operation and maintenance, $350,000: *Provided*, That the Secretary of the Interior is hereby authorized to enter into a contract with the El Paso County Water Improvement District Numbered 1 and the Elephant Butte Irrigation District of New Mexico by which the districts will be relieved of the obligation of making payment for the construction cost chargeable to the development of power of Elephant Butte Dam in the amount determined as equitable by the Secretary of the Interior in return for the conveyance by the said two districts to the United States of all the districts' right, title, interest, and estate in the use of said dam and other project works, including the project water supply, for the development of hydroelectric energy: *Provided further*, That in such contracts it shall be stated that the use of the dam, project works, and water supply for power purposes shall not deplete or interfere with the use thereof for irrigation purposes: *Provided further*, That the net earnings of the power plant and system belonging to the United States and any other available revenues shall be applied, until the cost thereof has been met, upon the cost of the power development, including (1) the cost of power facilities, (2) the amount invested, as herein authorized, in the cost of Elephant Butte Dam, and (3) the amount invested

by the Bureau of Reclamation in Caballo Dam: *Provided* further, That after the cost of the power development has been met the net earnings of the power plant and system shall be disposed of as Congress may direct.

No. 253

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In the Supreme Court of the United States

OCTOBER TERM, 1957

RONALD MILLER, ET AL., *Petitioners*

v.

ROBERT W. JENNINGS, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES AND ROBERT W. JENNINGS AND W. F. RESCH IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

PERRY W. MORTON,
Assistant Attorney General,

ROGER P. MARQUIS,
Attorney,
Department of Justice,
Washington 25, D. C.

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BRIEF FOR THE UNITED STATES AND ROBERT W. JENNINGS AND W. F. RESCH IN OPPOSITION

OPINION BELOW

The District Court did not write an opinion. The opinion of the Court of Appeals (Pet. App. 17-23) is reported at 243 F. 2d 157.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1957. The petition for a writ of certi-

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JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 1957. The petition for a writ of certi-

orari was filed July 9, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the waiver of sovereign immunity contained in Section 208 of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, embraced claims of the character asserted by petitioners here.

STATUTE INVOLVED

Section 208 of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. 666, provides:

> SEC. 208. (a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.
>
> (b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream.

* * * * * * * *

STATEMENT

Hudspeth County Conservation and Reclamation District No. 1, a Texas public corporation, and five individual landowners, purporting to represent all the landowners of the Hudspeth District, brought this action in the District Court of Hudspeth County Texas, against Robert W. Jennings, the Regional Director of the Bureau of Reclamation, W. F. Resch the Project Manager of the Rio Grande Reclamation Project, and the United States of America. Other defendants were eleven individual landowners residing in Texas, sued individually and as representatives of all landowners and water users, in New Mexico as well as in Texas, claiming adversely to plaintiffs in rights to the use for irrigation of the waters of the Rio Grande river between Elephant Butte Dam, in New Mexico, and the El Paso-Hudspeth County line in Texas. The El Paso County Water Improvement District No. 1, another Texas public corporation, and the manager of that District were also defendants.

The Rio Grande Reclamation Project is operated by the United States for the purpose of impounding and distributing the waters of the upper Rio Grande river, primarily for irrigation purposes. The waters are impounded at Elephant Butte Dam and Reservoir and Caballo Dam and Reservoir in New Mexico, about 125 and 80 miles, respectively, north of and upstream from El Paso. The waters are distributed through a series of ditches. Seepage and return flow water are

used and sometimes reused. The project serves an area extending downstream below El Paso. Nearly all the lands served or intended to be served by the project are within the Elephant Butte Irrigation District of New Mexico, lying wholly in New Mexico, or the El Paso District, a defendant, situate in El Paso County, Texas. Downstream from the project is the Hudspeth District, a plaintiff in this action, situated in Hudspeth County, Texas, which received water pursuant to certain contracts.[1]

The Court of Appeals succinctly described the nature of the seven controversies alleged to exist between petitioners and respondents as follows (Pet. App. 19-20): "Of these controversies the first is as to the effect of and priorities under the law of Texas relating to appropriative water rights; the second relates to rights in drainage waters; the third raises the question as to whether methods of financing of facilities can affect water rights; the fourth and fifth call for construction of the Warren Act, 43 U.S.C.A. § 523 et seq.; the sixth asserts that the upper Rio Grande usually has a normal measurable flow to which riparian rights attach; and by the seventh it is contended that the consumption of water for generating electric power is an unlawful invasion of the rights of users of water for irrigation."

The same plaintiffs sought practically the same relief against officials of the Reclamation Service and private parties in *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F. 2d 425

[1] The Hudspeth District is not, and never was, a part of the project but simply receives excess water therefrom. See *Hudspeth County Conservation & Reclamation District No. 1* v. *Robbins*, 213 F.2d 425 (C.A. 5), especially footnote 6, p. 431.

(C.A. 5), certiorari denied, 348 U.S. 833. That suit was dismissed because it constituted an attempt to sue the United States without its consent.[2] The present suit was thereafter filed in the District Court of Hudspeth County, Texas, naming federal reclamation officials, a Texas irrigation district, and individual water users as defendants. In addition, the United States was sought to be joined as a defendant under Section 208 of the Act of July 10, 1952 (R. 9). The case was removed to the United States District Court where motions to dismiss were made on numerous grounds (R. 78-79, 117-120). The court granted the motions on the ground that the United States had not consented to be sued or waived its immunity from suit in a case of the character and, therefore, that the court lacked jurisdiction.

The Court of Appeals affirmed, Judge Cameron dissenting without opinion. It held that the consent to suit in the 1952 Act did not embrace every suit involving water rights, but related only to suits for the adjudication of rights to the use of water of a river system or other source. The present case was not, the court held, a suit of that nature.

---

[2] Petitioners indirectly continue the attack upon that decision made in the earlier petition for a writ of certiorari (Oct. Term 1954, No. 238) when they describe the decision as holding that *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, overruled earlier cases. The assertion is wrong because of petitioners' failure to appreciate established distinctions between the various cases. See Additional Brief for the Government Respondents in Opposition in No. 238. The *Robbins* decision is, we believe, correct. Moreover, it is controlling here since petitioners have not challenged it below and do not now urge that it be re-examined.

ARGUMENT

1. Petitioners would read the 1952 Act so as to embrace any litigation of whatever nature in which the judgment might determine water rights or control the distribution of water. The statute waiving the sovereign immunity is not so broad. It is explicitly limited to "any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights * * *." The nature of the suits referred to is well established in the water law of the western states. Because of the nature of the problem, and the fact that correlative rights of many persons are in issue, the statutes of all the western states have provided in one form or another for suits to adjudicate all rights to a particular water source. See Wiel, *Water Rights in the Western States*, 3d ed., Vol. 2, pp. 1120, 1125; *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440, 447 *et seq.*; *In re Silvies River*, 199 Fed. 495, 503 (D. Ore.); *Washington State Sugar Co.* v. *Sheppard*, 186 Fed. 233, 235 (D. Idaho). These cases are fundamentally different from ordinary adversary litigation where the rights of only a few parties among themselves are determined. "In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purposes * * *." *Pacific Live Stock Co.* v. *Oregon Water Board*, 241 U.S. 440, 449; see also *Spanish Fork West Field Irrigation Co.* v. *District Court of Salt Lake County*, 99 Utah 527, 536-537, 104 P. 2d 353, 357; *State ex rel. Hinckley* v. *Sixth Judicial District Court*, 53 Nev. 343, 352, 1 P. 2d 105, 106.

The report of the Senate Committee on the Judiciary concerning the 1952 Act is even more specific in

showing that the Act was meant to apply only to those general adjudications of all water rights in a river system, and not to ordinary individual litigation where water right questions might become an issue. The report, referring to the general adjudications, says (S. Rep. No. 755, 82d Cong., 1st sess., p. 4): "Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceeding." Printed with the report for the purpose of showing the intent of the bill is an exchange of letters between Senator Magnuson and Senator McCarran, the then Chairman of the committee. Senator McCarran said that the bill "is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream." He continued. "This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value."

It is perfectly clear that the case petitioners seek to present is not of the nature just described. The Rio Grande is an interstate stream, and the federal reclamation project is an interstate undertaking. Rights in New Mexico necessarily come into play. The Court of Appeals said (Pet. App. 21): "There can be an adjudication of rights with respect to the upper Rio Grande *only in a proceeding where all persons who have rights are before the tribunal.*" But interested persons in New Mexico were not made parties to this proceeding in the Texas court. Cf. *Texas* v. *New Mexico*, 52 U.S. 991.

2. The alleged impracticality (Pet. 7-8) of joinder of all interested parties cannot justify this attempt to

adjudicate their rights in their absence. Petitioners refer to the fact that this is an interstate stream (Pet. 7). The difficulties in such cases arising from the territorial limitations of the jurisdiction of courts are resolved through the medium of original suits in this Court between the states involved. The presently pending case of *Arizona* v. *California*, No. 10 Original, is the most recent example. But the waiver of sovereign immunity in the 1952 Act did not extend to such cases by express provision of Congress, Subsection (c), *supra*, p. 3. This constitutes additional proof of the congressional intent not to extend the consent to a suit like the present one.

3. Petitioners seek to torture principles as to class actions to justify their joinder of eleven individuals purportedly as representatives of all upstream landowners. Obviously, this cannot be a true class suit where there is a joint, common, or derivative right. Nor can it be a "hybrid" class suit as petitioners try to make it by invoking *Dickinson* v. *Burnham*, 197 F. 2d 973 (C.A. 2), which concerned disposition of a fund among a class, in that instance stockholders. All the waters of the Rio Grande river cannot, by any stretch of the imagination, be called a "fund" in the hands of the Texas court. For example, one of petitioners' complaints is use of water at Caballo and Elephant Butte dams in New Mexico for power purposes. Indeed, petitioners assert that the waters in controversy are in the physical possession and control of the defendant reclamation officials (Pet. 12). Those officials are not proper parties to this case which lies, if at all, only against the United States. And the custody of the entire project is in the hands of the Secretary of the Interior. Cf. *New Mexico* v.

Backer, 199 F. 2d 426 (C.A. 10). As the court held in *Martinez* v. *Maverick County Water Con. & Imp. Dist. No. 1,* 219 F. 2d 666 (C.A. 5), a suit like the present one for a declaratory judgment as to water rights on a portion of the Rio Grande was a "spurious" class suit in which the judgment would bind only those parties before the court.

The alleged conflict with *Montezuma Canal Co.* v. *Smithville Canal Co.,* 218 U.S. 371, is likewise nonexistent. This Court was there dealing with incorporated companies. The trial court had found that individual landowners had surrendered to those companies their priorities and, by consent, water of the canal was delivered according to the interest of each owner in the canal. See 218 U.S. at p. 376. The *Montezuma* case simply means that an irrigation company represents its stockholders who formerly owned the water rights. This is made clear by the citation in *Montezuma* of *Arroyo Ditch & Water Co.* v. *Baldwin,* 155 Cal. 280, 100 Pac. 874, designating such representatives to be "either as their agent and trustee or as possessor of their former titles."

The basis for the claim of conflict with *People of the State of California* v. *United States,* 235 F. 2d 647 (C.A. 9), Pet. 8-10, is obscure. As the Court of Appeals held (Pet. App. 22), that decision is another application of the principle that all interested parties should be joined to an adjudication of rights in a stream. Apparently petitioners' argument is that there is conflict between the *California* case and another case now pending before this Court. *El Paso County Water Imp. Dist. No. 1* v. *City of El Paso,* 243 F. 2d 927 (C.A. 5), No. 198, this Term. Any conflict between those two cases has nothing to do with

this case. In fact, the *El Paso* case is not at all a general water rights adjudication in the sense of the 1952 Act but rested merely on contract issues. Specifically, the Court of Appeals said (243 F. 2d at p. 929) that it was unnecessary to discuss what petitioners say (Pet. 11) was a "sweeping pronouncement" concerning the Rio Grande compact.

CONCLUSION

There is no conflict, and the decision accords with the language of the Act, the clear intent of Congress, and the established principles in both water right litigations and class suits.[3] The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

AUGUST 1957.

[3] Since this is, we believe, clear we will not extend this brief by additional considerations which likewise lead to the same result. One of these rests on the fact that the 1952 Act applies only where it appears that the United States is the owner of or is in the process of acquiring water rights. Another arises from the fact that the injunctive relief sought by petitioners attempts in practical effect to have the court supersede the Secretary of the Interior in operation of the project. If such an extreme construction were to be given the 1952 Act, a serious constitutional question would be presented. See opinion of Judge Pope in *United States* v. *United States District Court*, 206 F.2d 303, 310-311 (C.A. 9). Another substantial question would be whether landowners in Texas could, under any view of class suits, be held to represent fairly claimants to water in New Mexico. These are illustrative of the matters which will require discussion in the event the petition for a writ of certiorari should be granted.

U.S. GOVERNMENT PRINTING OFFICE 1957—433866/R.O. 128

Office - Supreme Court, U.S.
FILED
OCT 7 1957
JOHN T. FEY, Clerk

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RONALD MILLER, ET AL.,
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v.

ROBERT W. JENNINGS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE STATE OF TEXAS, AMICUS CURIAE

WILL WILSON
Attorney General of Texas

JAMES N. LUDLUM
First Assistant Attorney General

HOUGHTON BROWNLEE, JR.
Assistant Attorney General

JAMES W. WILSON
Assistant Attorney General
Capitol Station
Austin, Texas

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v.

ROBERT W. JENNINGS, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE

The State of Texas, by its Attorney General, asks leave of the Court to file its Brief, Amicus Curiae, in the above entitled and numbered cause.

WILL WILSON
Attorney General of Texas

JAMES W. WILSON
Assistant Attorney General

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BRIEF FOR THE STATE OF TEXAS AMICUS CURIAE

ARGUMENT

The State of Texas is vitally interested in the issues raised by the Petition in this case because of the adverse effect the decision of the Court of Appeals will have on state control of the disposition and use of its water resources. In the last analysis, the extent to which a state controls the utilization of its water resources is completely dependent on the extent to which the courts are able to compel obedience to the provisions of its laws. Even though state law may confer certain rights on water users which under the law are to be respected by upstream

users, if on any stream the downstream users and the state are unable to insist on compliance with state law in court, the water policies of the state have become a dead letter on that stream.

The decision in *Hudspeth District v. Robbins*, 213 F. 2d 425 (CA5) had precisely this effect on streams on which there are Federal Reclamation Projects. In that case it was held that the courts are without jurisdiction over water rights of individual landowners claiming under state law but served by a Federal Reclamation Project because the United States is an indispensable party to such suits, and sovereign immunity had not been waived. Thus, despite the clear and unequivocal declarations in the Reclamation Act that the water rights of landowners within Reclamation Projects shall be subject to state laws "relating to the control, appropriation, use, or distribution of water used in irrigation,"[1] under *Robbins* the policies of the state did not govern streams on which Reclamation Projects are located, but at most furnished general guides for federal officials to use in finally determining the rights of water users served by the Project and those downstream.

It is not unusual, of course, for the sovereign immunity doctrine to produce harsh results, but the waiver of immunity in issue here was specifically designed to correct this anomaly whereby private landowners within a state claiming water rights under state law are permitted to plead the sovereign immunity of the United States to avoid meeting on the merits contentions that they violate state law.

[1] Act of June 17, 1902, c. 1093, § 8, 32 Stat. 390; 43 U.S.C. § 372.

[2] Act of July 10, 1952, 66 Stat. 560, 43 U.S.C.A. 666.

As interpreted by the Court of Appeals here, however, the consent statute grants no consent, and this holding gives Texas, the only state within the reach of the pronouncements of the Court of Appeals for the Fifth Circuit to which the Reclamation Act and the consent statute apply, great concern. It is imperative that the State and its citizens know whether approval by Texas of a federal project on a stream still constitutes a substitution of federal administrative discretion for judicial enforcement of its water laws in the affected area.

The waiver of sovereign immunity here in issue extends sovereign consent to the joinder of the United States as a party defendant in "any suit for the adjudication of rights to the use of water of a river system or other source," and any suit cast so as to require the adjudication of the relative rights of any two or more water users on a stream is a "suit for the adjudication of right to the use of water of a river system" and comes within the terms of the consent statute. This is true whether the suit takes the form of injunction, suit to quiet title, declaratory judgment, statutory adjudicatory proceeding or otherwise. There is no need to go behind the plain meaning of the statute to ascertain its effect.

The argument of the Solicitor General that the term "any suit for the adjudication of rights to the use of water of a river system" extends sovereign consent only to suits in which jurisdiction has been acquired over all persons having rights on a river system for the purpose of adjudicating the rights of all *inter sese* is wholly irreconcilable with the language it purports to apply.

The Government argues that when so interpreted the Statute excludes ordinary suits for the adjudication of the relative rights of a few water users on a stream and applies only to the special statutory proceedings provided in some western states for the adjudication of all rights on a stream within the state. It is apparent, however, that if Congress did in fact limit its consent to suits in which all claims on a "river system" are joined for a general adjudication of water rights, these statutory proceedings also fall short of the consent granted for the simple reason that no state can obtain jurisdiction of all rights on an entire *river system* of any significance. No stream in Colorado, Nevada, Nebraska or Wyoming, for example, comes within the terms of the statute as interpreted by the Government since each stream in these states is but a part of a larger interstate river system, and these states are obviously without jurisdiction over all rights on the vast river systems to which their streams contribute. In order to reach the conclusion advocated by the Solicitor General, it would be necessary for the Court to re-write the phrase "any suit for the adjudication of rights to the use of water of a river system" so as to read "any suit for the adjudication of *all* rights to the use of water of *that part of a river system which lies within a single state.*"

The obvious fallacy in the Government's argument that the statute requires the joinder of all rights on the stream lies in its assumption that Congress intended to prescribe party requirements completely at war with the joinder rules of the courts in which these cases are to be tried. No court has ever held

that there must be a general adjudication of all rights to a particular source of supply before any rights to the use of the water may be determined. The only authority cited by the Court of Appeals which considered any such contention specifically rejected it. *Wilson v. Reeves County W. I. Dist. No. 1*, Tex. Civ. App. 256 S. W. 346, and the cases cited by the Government clearly recognize that adjudications of water rights are often had in suits with only a few water users before the court. See e. g. *Washington State Sugar Co. v. Sheppard*, 186 Fed. 233 (D. Idaho); *Spanish Fork West Field Irrigation Co. v. District Court of Salt Lake City*, 99 Utah 527, 104 P. 2d 253. The rules governing joinder of parties in suits for the adjudication of water rights are succinctly stated in Wiel, *Water Rights in the Western States*, 3d Ed., Vol. 1, pp. 687-688, as follows:

> "In order to settle the rights of all claimants upon a stream against each other, all must, hence, be brought into court in the same suit. That all the owners of outstanding rights in the stream be brought into court so that the rights of each against all may be determined by the decree, is now frequently provided by statute, as already mentioned. And in the absence of a statute so commanding it is within the inherent power of the court to order the joinder in any suit of all the other claimants. . . . And finally, without statute or court order, it is allowed to the parties to voluntarily join all the claimants they see fit, in any such action to determine rights. . . .
>
> "But in the absence of statute, such court order for joinder of outstanding rights is dis-

> cretionary only, and such voluntary joinder of them is permissive only. In the absence of statute, it is not *essential* to have them all brought in. If they remain out and the court does not think it advisable to order them in, the decree can settle nothing against them, and can only determine the relative rights of those in court; but that it can do, and as to that the others are not necessary parties. They are necessary to the rendition of a decree good "against the world," but not necessary to a decree only as against the specific party who is in court. The court may determine that he is a wrongdoer against the plaintiff without determining what plaintiff's rights are against the rest of the world. . . ."

The Solicitor General states that "the statutes of all the western states have provided in one form or another for suits to adjudicate all rights to a particular water source". (Government's Brief, p. 6), and implies that in the western states (i. e. those having the doctrine of prior appropriation) no water rights may be judicially determined except in these general adjudications. The inaccuracy of these contentions is readily apparent. Texas and Kansas have no such special statutory procedures at all, and in most of the other western states the statutory proceeding is an alternative or supplementary remedy to ordinary suits for the adjudication of relative water rights. Only in Nevada, New Mexico, North Dakota, Oklahoma, South Dakota and Utah is there any requirement that all claimants be joined in any suit for the adjudication of rights in a particular water source. Hutchins, *Selected Problems in the Law of Water Rights in the West*, pp. 80-109, 431-469.

While it may be feasible in sparsely populated and extremely arid states to require the joinder of all claimants on a stream system whenever any dispute over rights arises, it is a physical impossibility to do so in Texas. In Texas, and in most other western states, it is recognized that a dispute between two water users as to their rights may be settled between them without dragging in all parties on the stream whose rights are not in dispute. Only those whose presence is necessary to a final resolution of the controversy before the court are required to be joined unless the court determines that an adjudication of that controversy would only precipitate further disputes or that the convenience of the stream would otherwise be served by the joinder of additional rights. Statutory adjudicatory procedures are, of course, included within the phrase "any suit for adjudication of rights to the use of water of a river system," but many other types of suits fall in the same category. There is no evidence that Congress preferred the one to the others in extending its consent to be joined as a defendant to water rights adjudications.

The proper construction of the waiver of immunity here in issue is apparent. If a suit is cast so as to require the adjudication of water rights, and the United States is a necessary party and claims appropriative rights, consent to the adjudication of the rights of the United States has been given. Congress intended by this consent statute to mitigate the hardships resulting from sovereign immunity, and the relief granted by Congress should not have been

artificially circumscribed by the Court of Appeals so as to render its purpose ineffectual.

Perhaps the Court of Appeals did not intend to hold that the consent statute required the joinder of all claims on a river system as a condition of sovereign consent, but did intend to hold that, under the ordinary rules governing party determinations, the various upstream water users served by the Rio Grande Project are necessary or indispensable parties to an adjudication of the water rights under which the United States diverts water for their benefit. If so, the question presented does not involve an interpretation of the consent statute since a jurisdictional defect in parties would require a dismissal of the complaint in any case.

Thus is raised the question of whether the class action device is available for the joinder of a class of necessary or indispensable parties to a water suit. The State of Texas has a very real interest in this question also because Texas courts, having adopted Rule 23 as their own,[3] are inclined to follow federal decisions as to the construction of borrowed federal rules. *Ex Parte Odom*, 157 Tex. 577, 271 S. W. 2d 796. If the Court of Appeals correctly states the law relating to class actions, the import of its decision greatly exceeds its effect on suits in which the United States is an indispensable party. If all water users served by an irrigation project must be personally joined before the rights under which the project diverts water may be adjudicated, no water rights suit of any significance is subject to judicial determination in the federal courts or in Texas. For example, a

[3] Rule 42, Texas Rules of Civil Procedure

suit which far exceeds this one in scope and complexity is now pending in the Texas courts for the adjudication of water rights in the lower Rio Grande, see *Hidalgo County W. I. D. No. 2 v. Blalock*, ___ Tex. ___, 301 S. W. 2d 593, and the successful completion of that suit is absolutely dependent on a view of class actions directly opposed to that of the Court of Appeals here.

It will be assumed that the upstream water users served by the Rio Grande Project are necessary or indispensable parties. Similarly situated water users were held to be necessary parties under Texas practice in *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733, and *Wilson v. Reeves County W. I. District No. 1*, Tex. Civ. App., 256 S.W. 346, cited in the opinion of the Court of Appeals, and the same result may follow in the federal courts from *Commonwealth Trust Co. of Pittsburg v. Smith*, 266 U.S. 152. The allegations of the complaint are clearly sufficient as against a motion to dismiss on the issues of the existence of a class, absence of antagonistic interests and proper representation. Therefore, the only question for decision is whether a judgment in an action against representatives of a class of necessary or indispensable parties binds all members of the class.

In holding that a judgment here would not bind the class, the Court of Appeals relied on its previous decision in *Martinez v. Maverick County W. C. & I. D. No. 1*, 219 F.2d 666 (CA5), but the cases are not in any way apposite. In the *Martinez* case a declaratory judgment was sought in a diversity action to resolve unsettled questions of substantive Texas

law relating to the relative rights of riparian proprietors and those claiming appropriative rights. Neither the plaintiff nor the defendant classes were necessary or indispensable parties to this declaratory proceeding. The Court affirmed the dismissal of the complaint, one judge dissenting, as within the trial court's discretion. The Court reasoned (a) that the judgment would not bind absent members of the classes, since the attempts at virtual representation were only "spurious" class actions under Rule 23(a)(3), and (b) that the decision would not be effective as *stare decisis* since the suit required the application of substantive law.

This is certainly not the case here. In the first place, it is not within the discretion of a federal court to dismiss a case because of unsettled questions of substantive state law when the case has been removed from the very court which could have settled the issues. In the second place, this is not a "spurious" class action under Rule 23(a)(3) but a "true" class action under Rule 23(a)(1), and a judgment in a true class action, as the Court in *Martinez* specifically recognized, will bind all members of the class:

> "As has been often stated, Rule 23(a), Federal Rules of Civil Procedure divides class actions into three types according to the jural type, 23(a)(1), covers cases where the right sought to be enforced is joint, common, or derivative, and is termed the *true class suit*. 3 Moore's Federal Practice, 2nd Ed., Sec. 23.08, pp. 3434 et seq. Professor Moore states that 'The doctrine of res judicata as applied to true class actions has been clearly settled by the

> United States Supreme Court in Supreme Tribe of Ben Hur v. Cauble, (255 U.S. 356 [41 S.Ct. 338, 65 L.Ed. 673])', 3 Id., Sec. 23.11, p. 3460. The second type, 23(a)(2), covers cases calling for the distribution or management of specific property, and is termed the *hybrid class suit*. 3 Id., Sec. 23.09, pp. 3439 et seq. As to hybrid class actions, Professor Moore succinctly states the rule as follows: 'Insofar as the proceedings operate in rem they are conclusive; insofar as they are in personam they do not bind those not parties.' 3 Id., Sec. 23.11(4), pp. 3468, 3469. The third type, 23(a)(3), covers cases where the class is formed solely by the presence of a common question of law or fact, is in reality a permissive joinder device, and is termed the *spurious* class suit. 3 Id., Sec. 23.10, pp. 3442 et seq. In a spurious class action the decree does not bind the class, but binds only those actually before the court. 3 Id., Sec. 23.11(3), pp. 3465 et seq., and authorities there cited." (219 F.2d at 671-672).

Though the Court of Appeals correctly stated the controlling principles in the *Martinez* case, these principles have been misapplied here. In *Martinez* the members of the class were not necessary or indispensable parties, while here all members of the defendant class are, as is shown above, necessary or indispensable to the suit, and this difference, it is submitted, is decisive. Though Rule 23(a)(1) refers to "joint" and "common" rights in describing suits within its provisions, the key to the question of whether a particular suit falls within the true class action category is not found in any theoretical an-

alysis of the rights of the class under substantive law, but is found in their jural relations—the eminently practical inquiry into their status as parties to the particular lawsuit under consideration. *Pentland v. Dravo Corp.*, 152 F.2d 851 (CA3). Professor Moore states the test in his treatise as follows:

> "Various tests have been proposed to determine whether a suit is a true class action. The doctrine of *Temperton v. Russell* that beneficial proprietary rights are the determinative factor of the propriety of class suits has fallen into disrepute. So has the doctrine that the presence of a fund is the determinate. These efforts at nomenclature are, however, significant. They illustrate the desire of courts to find a unity of interests between the parties. This can be expressed better in terms of joinder. *The 'true class suit' is one wherein, but for the class action device, the joinder of all interested persons would be essential.* This would be in cases where the right sought to be enforced was joint, common or derivative." 3 Moore's *Federal Practice*, 2d Ed., Sec. 23.08, pp. 3434-3435. (Emphasis supplied).

The joinder of all interested parties is "essential" when they are necessary or indispensable parties. It follows that if all members of a class are necessary or indispensable to the suit, *ipso facto* they form a true class, and all members of the class will be bound by judgment entered in a suit brought by or against their representatives.

The basic error of the Court of Appeals lies in its failure to recognize that a court's holding that all

members of a class are necessary or indispensable parties is by definition also a holding that the rights and duties of the members of the class are "joint" or "common" within the meaning of Rule 23(a)(1). The question of whether the rights and duties of the members of the class are "joint" as opposed to "common" is largely academic, since there is no difference in legal consequences between the two categories. But under Professor Moore's analysis of the distinction between joint and common rights, insofar as the plaintiff class here seeks to establish in itself a superior water right independent of those claimed by the defendant class, the rights asserted by each class are "joint". *Benz v. Compania Naviera Hidalgo S. A.*, 233 F.2d 62 (CA9), aff'd 353 U.S. 138; *Montgomery Ward & Co., Inc. v. Langer*, 168 F. 2d. 182 (CA8). Insofar as the plaintiff class seeks to establish in itself a beneficial interest in the same appropriative rights as those under which the defendant class claims, the rights asserted by each class are "common". *Supreme Tribe of Ben Hur v. Cauble*, 255 U. S. 356; *Smith v. Swormstedt*, 57 U. S. 288. The significant factor from the standpoint of deciding cases, however, is that in both aspects of this suit all members of the class are necessary or indispensable parties, and this being true, the suit is a true class action, and all members of the class will be bound by a judgment entered in the suit. 3 Moore's *Federal Practice*, 2d Ed., Sec. 23.11, pp. 3456 *et seq.*

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[1] 3 Moore's *Federal Practice*, 2d Ed., Sec. 23.08, pp. 3434 *et seq.*

CONCLUSION

The decision of the Court of Appeals is in error both in its construction of the consent statute and in its construction of the class action rule, and since a correct determination of both issues is of vital importance to effective control of the distribution and use of water resources in Texas and elsewhere, the Writ of Certiorari should be granted.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

JAMES N. LUDLUM
First Assistant Attorney General

HOUGHTON BROWNLEE, JR.
Assistant Attorney General

JAMES W. WILSON
Assistant Attorney General

PROOF OF SERVICE

I, James W. Wilson, Assistant Attorney General, certify that I have mailed copies of the foregoing Motion and Brief to the Attorney General and the Solicitor General of the United States, respectively, at the Department of Justice Building, Washington, D. C., and to Eugene T. Edwards at 11th Floor Bassett Tower in El Paso, Texas, Louis A. Scott at 1100 First National Building in El Paso, Texas, Theodore Andress at El Paso National Bank Building in El Paso, Texas, and J. A. Rauhut and W. Morgan Hunter at the Brown Building in Austin, Texas.

JAMES W. WILSON

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 253

RONALD MILLER, ET AL,
Petitioners,

v.

ROBERT W. JENNINGS, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' MOTION FOR REHEARING

THEODORE ANDRESS
El Paso National Bank Building
El Paso, Texas

J. A. RAUHUT
W. MORGAN HUNTER
Brown Building
Austin, Texas
Attorneys for Petitioners

Of Counsel:

Andress, Lipscomb, Peticolas & Fisk
El Paso, Texas

Powell, Rauhut, McGinnis & Reavley
Austin, Texas

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MAY IT PLEASE THE COURT:

Petitioners respectfully move the Court for a Rehearing of the order of October 14, 1957, denying the petition for certiorari.

On October 7, 1957—too late for consideration by the Court—the State of Texas filed a brief as amicus curiae, explaining the importance of the case to the State and the people of Texas and the arguments which the State deems here controlling.

For the reasons assigned in the Brief of the State of Texas, this motion for Rehearing should be granted and a writ of certiorari should issue.

Respectfully submitted,

THEODORE ANDRESS
El Paso National Bank Building
El Paso, Texas

J. A. RAUHUT
W. MORGAN HUNTER
Brown Building
Austin, Texas
Attorneys for Petitioners

Of Counsel:

Andress, Lipscomb, Peticolas & Fisk
El Paso, Texas

Powell, Rauhut, McGinnis & Reavley
Austin, Texas

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